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"The Development of the Law in relation to Aircraft"

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Chapter 1. Introduction.

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PART I.

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Johnson's Rasselas such possibilities and dangers are conceived. "If man were all virtuous I should with great alacrity teach them all to fly. But what would be the security of the good, if the bad could at pleasure invade them from the sky? Against an army sailing through the clouds, neither walls, nor mountains, nor seas, could afford any security." When these words were written, flight, in the modern sense of the word, had not become a reality, although, apart from the early legends, as early as the eleventh century attempts to fly had been made by attaching wings to the body, and a balloon ascent, which, however, is not authenticated, is mentioned at the Coronation of the Emperor Fo-Kien in 1336.

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several days later, during the battle of Fleurs, it again ascended and obtained useful military information. By 1902, Santos-Dumont had completed a flight, which was highly successful, in a non-rigid airship, and, in 1906, Count Ferdinand von Zeppelin completed a flight of 200 miles in a similar craft. Prior to this, however, in 1903, the brothers Wilbur and Orville Wright completed the first power flights in heavier-than-air craft at Kill Devil Hill, North Carolina, and when this occurred it might truly be said that man had conquered the air.

In so doing, he had brought upon himself a multitude of new problems, and, in particular, in the realm of the law, opened up a vast new field of thought. The visions of Rasselas had become a reality, the dangers which he had visualised were now real dangers, and eminent jurists of all nations applied themselves to the task of producing new codes of law to regulate the use of man's new invention, the flying machine. They were not slow to appreciate that the laws which they must formulate must be entirely new laws - the air was, in itself, a realm of law. Their first and natural instinct was to compare the vast spaces of the air with what appeared to be, at first sight, the similarly extensive expanses of the sea but they were soon to be disillusioned, for, while maritime precedent might be invoked with success in some of the problems with which they were confronted, a close comparison between the sea and the air revealed such fundamental differences that it became evident that

maritime law was virtually useless as the model on which to base the new code.

There were other peculiar and vital characteristics about the new machine, the use of which had now to be regulated. In particular, the lawyers saw that flight was not limited to national boundaries, that the sea offered no barrier, for in 1909 Louis Bleriot had crossed the English Channel in a heavier-than-air craft, and that, accordingly, their legislative efforts must not be merely national in character. It was an International Code of Law which they would require to formulate. National codes would also be necessary, but it was of primary importance that all such National codes must be uniform, and must, in principle at least, be based on one International Code, if the invention of the flying machine was to be developed and its great possibilities exploited with success.

However, the first attempts to formulate codes for the regulation of the use of aircraft were directed in the main towards regulating the use thereof in times of war. When the first military balloon ascended in 1794 a new era of warfare was inaugurated for, even in the earliest stages of its development, it was clear that the balloon was potentially dangerous as a weapon of war. Its uses in that direction were multifarious but the first, and most natural, use to which it was put was for purposes of espionage, and the earliest legal questions discussed were mainly on that topic.

It was only to be expected that this should be so and that the rules of warfare should first be considered, as the moment man ascended from the earth he could be used to advantage in the armed forces of his country. Therefore, rules must be formulated to regularise his operations. Flight had to progress far, before there would be any necessity for formulating laws to regulate the use of aircraft in times of peace, although the effect of flight on the question of sovereignty of the airspace must ^{have occurred} have, and, in fact, did occur to the jurists at an early stage in the development of this branch of the law. Doubtless, when the balloon first appeared, its use for commercial purposes was never considered although Zitelmann (1) mentions several early writers who discussed questions of law arising from the use of aircraft in time of peace. In 1793, Putter considered the question of "air-balls" becoming practically useful and whether, in that event, the Emperor would derive revenue from them as "regalia"; in 1891, Manduca discussed criminal acts committed in the air space; and in 1901, Rosenberg lectured on the liability of balloonists in damages for injuries caused by them. Perhaps the first judicial reference to the effect of aircraft is in the English case of *Pickering v Rudd* (1815, 4 Camp.219), When, on a question of trespass, Lord Ellenborough states - "I do not think it is a trespass to interfere with the column of air superincumbent on the close...

(1) *Luftschiffahrtsrecht*; Hazeltine- Law in the Air.

it would follow that an aeronaut is liable to an action quare clausum fregit at the suit of the occupier of every field over which his balloon passes in the course of its voyage."

The dawn of the twentieth century may truly be considered as the dawn of aviation law. Although the first serious attempt to legislate had been made at the Hague Conference in 1899, and the question of espionage had been dealt with at a Conference in Brussels in 1874, it was not until 1901 that the first real attempts to formulate full and complete codes of law were made, not only by the Institute of International Law and by the International Law Association, but also by eminent individuals. As we shall see, the development of aviation and the corresponding development of the law in relation thereto progressed slowly until 1914, when, on the outbreak of the Great War, the development of aviation itself received a sudden impetus and abnormal technical progress was made during the four years of that conflict. Before the War was ended, the possibilities of aircraft not as weapons of war, but as a means of communication and transit in time of peace were recognised, and an exhaustive investigation inter alia as to the laws which would require to be enacted on the cessation of hostilities, was made in Great Britain by the Civil Aerial Transport Committee which reported to the newly formed Air Council in 1918. The termination of the War found all nations ready and willing to do everything in their power to facilitate peace and a

glut of International Treaties and Conventions followed. Aviation law benefited by this popular feeling and the time was now ripe to complete the International Convention on Aviation law, which the Conference held in Paris in 1910 had failed to complete, due to the impossibility of reconciling divergent views on questions of principle. The International Convention of 1919 is the charter of the air and is the basis on which the national systems of aviation law are founded.

My object is to trace this development of aviation law, in so far as it is possible to do so, in three main parts. In the first, I shall consider the origins of the law, that is, the problems which arose prior to the outbreak of the Great War; in the second, the effect of the Great War on aviation; and, in the third, the post war legislation and development. I shall concern myself mainly with the development in time of peace, that being of infinitely more importance than the development of the rules of warfare, but in each of the first and third parts I shall devote a chapter to this latter topic. The national system of legislation mainly referred to will be that of Great Britain, but other national systems and particularly that of the United States of America, will be referred to for purposes of comparison.

large over the underlying States or did these States have the right in law to prevent such flight? Was a neutral State powerless to prevent a combat between the aircraft of two belligerent Powers over its territory in time of war? Such were the questions asked and on their solution

Chapter 2.The Pioneers of the Law.

The names of such distinguished jurists as M. Paul Fauchille, Dr Hazeltine, Professor Westlake, Dr. Lycklama à Nijeholt, Nys, Meyers, Merignhac, and others will go down to posterity as the pioneers in this new realm of law. They it was who foresaw the difficulties, many of which are even now unsolved, and their opinions must of necessity carry great weight and form the basis of any discussion. A survey of the work they accomplished is perhaps best undertaken by considering the problems with which they were faced and the manner in which they dealt with them.

The Right to Fly - The International Law.

Before any other question raised by the flight of aircraft could be considered, it was necessary to decide the fundamental question of the right, in law, to fly at all. The maxim cujus est solum ejus est ad coelum usque ad inferos had long regulated the right of the individual in his property and flight over such property was apparently a violation of the owner's rights as expressed in the maxim. Similarly, but of greater importance, what rights had the underlying States to regulate the flight of aircraft over their territory? Were aircraft free to roam at large over the underlying States or did these States have the right in law to prevent such flight? Was a neutral State powerless to prevent a combat between the aircraft of two belligerent Powers over its territory in times of war? Such were the questions asked and on their solution

the whole future development of aviation depended. In the seventeenth century, the conflict between the mare liberum and the mare clausum commenced, and freedom prevailed. In the twentieth century the freedom of the air was at stake but the battle ended abruptly in 1914 - this time sovereignty had triumphed. This battle for freedom of the air might never have been waged had it not been for two mistaken conceptions which misled the early jurists - in the first place, the mistake of drawing too close and erroneous an analogy between the sea and the air, and, in the second place, the failure to distinguish the air as an element from the air space which it filled, and the confusion of ideas resulting therefrom.

There were the two distinct schools of thought in this conflict for freedom of the air. The one school maintained that the air space was by its very nature free, while the other maintained that the subjacent State had sovereign rights in the air space above its territory. These were the two main theories diametrically opposed to one another, but in each there were varying shades of opinion. Of those who maintained complete freedom, some advocated freedom without restriction, others freedom restricted by some special rights, and others freedom restricted by a territorial zone, while the sovereignty theorists had similar divisions of opinion, some favouring complete sovereignty, others sovereignty restricted by the right of innocent passage for aerial navigation,

and others who maintained full sovereignty, but up to a limited height only.

The conflict may truly be said to have commenced in 1901 when Fauchille presented his Code to the Conference of the Institute of International Law. "L'air est libre. Les Etats n'ont sur lui en temps de paix et en temps de guerre que les droits nécessaires à leur conservation - les droits sont relatifs à la répression de l'espionnage, à la police douanière, à la police sanitaire, et aux nécessités de la défense" - so read Article 7, of his Code. (1) Fauchille was a protagonist of air freedom, but subject to certain reservations, and, actually, favoured air freedom restricted by a territorial zone. The essential words were - "the air is free" - and in support of this theory rallied many distinguished lawyers who maintained complete air freedom, unfettered by restrictions. All, with the exception of Nys, treated the air as an element, and in the opinion of Dr Hazeltine it is only the arguments of Nys which are worthy of consideration. The Roman Law and the works of Grotius, the champion of the mare liberum, formed the foundations on which the complete air freedom theorists built up their arguments. In Justinian's Institutes (2) the law is thus set forth - "Naturali jure communia sunt omnium haec: aer et aqua profluens et mare" - and in other works on the Roman Law the air is treated as a res communis. According to Grotius(3)

(1) Annuaire XIX. 1902, p. 32. (2) II. 1, 1.

(3) Grotius, Rights of War and Peace (Campbell's Translation) 1814, p.229.

the sea was common to all men, and the same might be said of the air as common property except that no one could enjoy it without at the same time using the ground over which it passes or rests. This naturally referred to the air as an element, and, founding their arguments on such principles, it is not difficult to understand how Wheaton held that the sea and the air were elements belonging to all and that no nation could possess them; how Bluntschli argued that the States had no authority in the air space because they could not enclose the air in their frontiers; and how writers such as Pradier-Fodéré and Stephen maintained that the great air currents were not legally under the control of a State. (4) These writers had failed to appreciate the crucial difference. Even the supporters of complete sovereignty would support the contention that the invisible air which is breathed by all living creatures is free to all and incapable of control by any one individual or State but the air space which it fills is in an entirely different category. Lycklama à Nijeholt was conscious of the difference when he wrote - "Sovereignty wants a sphere, a domain, where it can be exercised. In theory it is of no account what there may be in that sphere; and in practice is the fact that it is filled with a moving element where fixed marks cannot well be imagined enough to make sovereignty there practically impossible? We think not." (5)

(4) Hazeltine, *The Law of the Air*, p. 11

(5) *Air Sovereignty*, p. 22.

Nys appreciated the distinction between the air space and the air as an element but, nevertheless, advocated complete air freedom. His fault was in drawing too closely the analogy between the sea and the air, and having failed to see the fundamental differences between the two, and, in particular, between the ship sailing on the sea and the aircraft flying through the air, his argument became substantially this - as the principle of mare liberum has been accepted then the natural consequence is that complete air freedom must be the rule. (6) It is difficult to see how such a distinguished jurist could even at the beginning of the twentieth century when flight was in its infancy fail to appreciate the obvious differences in character between the sea and the air, the ship and the aircraft, for, to use the words of Kuhn, "The air "at all events is not the sea, an aircraft no ship, "and a complete analogy is neither made de lege lata "nor advisable de lege ferenda". While the idea of the air, or even the vast air space, as completely free to all must have been alluring, and did, in fact, command considerable attention when first propounded, it was early discarded, and Fauchille who threw down the gauntlet - the air is free - criticised it on the grounds, first, that aircraft could thereby fly and do just as they pleased over the territory of a State without interference, and, second, that, as regards delicts committed on board both public and private aircraft, they would fall to be dealt with according to the law of the

(6) Annuaire of the Institute XIX pp.106-108 for NYS' views.

State under whose flag the aircraft flew. (7)

Of those who maintained air freedom restricted by some special rights, the main exponent was Meili who, in 1908, maintained that the air was free, subject to the rights of territorial States to do what was necessary for their self preservation. In the following year he enlarged upon this view by stating that States should have rights not limited horizontally for the preservation of their interests enabling them to defend themselves against balloons and aeroplanes.(8) He had the support of the Institute of International Law both in 1906, when the control of wireless telegraphy was discussed, and again in 1911, when it passed a series of Resolutions dealing with the "Regime juridique des Aeronefs." The Third Resolution dealing with the regulation of aircraft in time of peace was couched in the following terms - "La circulation "aérienne internationale est libre sauf le droit pour "les Etats sous-jacent de prendre certaines mesures, à "determiner, en vue de leur propre sécurité et de celle "des personnes et des biens de leurs habitants." This view, which according to M'Nair is based on the argument that the air is physically incapable of appropriation because it cannot be continually occupied (9) also found considerable support at the time, due no doubt, to the fact that while it was pleasing to the idealist who regarded the ethereal sphere as free to all, it also conceded to those more

(7) La circulation Aérienne et les droits des Etats en temps de Paix, 1910. p. 3.

(8) Lycklama à Nijeholt "La Souveraineté Aérienne" pp. 11 - 12.

(9) M'Nair, 1 Journal Air Law, p. 384.

practically minded the right of self protection, the necessity for which was only too apparent if aircraft were to be free to fly at will above them.

The danger of following the analogy of the sea is perhaps best seen when the views of those writers who supported the zone theory are considered - that is, air freedom restricted by a territorial zone. The greatest difficulty with which the protagonists of this school of thought ^{were} was faced was the complete failure to obtain unanimity as to the height and extent of the zone. Some, such as Ferber, were bold enough to fix the limit of the zone exactly, but others, such as Meyer, were sufficiently non-committal to put the limit as high as a State could make its authority felt directly over its territory, presumably the limits of gun fire. (10) Despagne maintained that each State ought to have the right of preventing such use of the air as is dangerous to its own security - "the analogy of the maritime belt could be applied to the air space above the land." (11) Merignhac advocated freedom except for a territorial atmosphere to be fixed by International agreement, but not too high. This height must be high enough to guarantee the interests of the State and low enough to respect the interests of aerial navigation. Oppenheim, on the other hand, claimed that the territorial atmosphere was not a special part of the territory of the State, but each State could exercise jurisdiction up to a certain height. (12) The zone theory,

(10) Hazeltine, The Law of the Air, p. 16.

(11) Hazeltine, op.cit. pp. 18-19.

(12) Lycklama à Nijeholt, Sovereignty of the Air, p.12.

however, will always be identified with Fauchille, whose Article is quoted above, and to whom must go the credit of commencing the battle in the field of aviation law. It is to the arguments of Fauchille that all subsequent writers have directed their criticisms. His remarks when he presented his proposed Code showed that it was not so much on the analogy between the sea and the air that he founded his Seventh Article, but rather, that he found support from the same source as those who advocated air freedom restricted by some special rights, namely that the air cannot be owned because it cannot be occupied, and, therefore, a sovereign jurisdiction cannot be exercised. Fauchille has given certain consequences which would follow from the adoption of Article 7, and these have been summarised by Hazeltime. A State would have the right to take those means which are necessary for the security of its population by prohibiting circulation below a certain height. This, incidentally, restricts materially his "freedom" theory. To protect itself from espionage, a State could prohibit aerial navigation in certain regions of the atmosphere. It could further visit and search aircraft circulating in the air space above it as a protection of its own economic and sanitary interests. Public and private aircraft are liable for acts committed on board, only to the laws of the State of the Flag, but where the acts infringe the territorial State's right of preservation the aircraft would be subject to the regulations of the territorial State. The right of preservation would extend to prohibit the passage of foreign military aircraft. (13)

(13) Hazeltime, Law of the Air, pp. 21-23.

At the present day the arguments against air freedom are even more forcible than they were some thirty years ago, but some of the criticisms even then appear almost too obvious. To say that the sea lies to the side of the territory of a state whereas the air lies directly above it, is to state an indisputable fact, but, nevertheless, therein lies the crux of the matter. The fact that the air space does lie above the territory of a State must undoubtedly be the death blow to air freedom. No zone and no protective rights could possibly safeguard a State from the enormous dangers of allowing aircraft of foreign States - and, for that part, even its own national aircraft - to fly at will over its territory. Not only is the air zone important to the State but it is essential to the very existence of the inhabitants and to the exercise of the State's rights and manifold privileges. The protagonists of air freedom must have been fully aware of this - indeed the very mention of a zone or protective rights reveals that they were - and one is tempted to wonder how the air freedom theory received the support it did from so many distinguished writers.

The Sovereignty theorists, led by Westlake, were on safer ground, but, once again, the parallelism of the sea proved an allurements, and beside those who maintained absolute sovereignty, are found once again the zone theorists and others who maintained a type of servitude right of passage for aircraft while admitting sovereignty in principle. The latter two schools of thought were led astray by founding their arguments on the principle of the territorial waters.

There is little difference in practice between the zone theorists of the freedom school and those of the sovereignty school. Both agreed that beyond a certain height the air was free. Where they differed was in the fact that in the case of the former only certain rights of preservation were recognised up to the fixed limit, whereas in the latter case full sovereign rights were accorded to the State. Both had the same difficulty in determining the height of the zone. Von Holzendorf fixed it at 1000 metres whereas von Bar brought it as low as 50 to 60 metres. Von Liszt fixed it with reference to the extent of actual domination, while to Rivier, Pietri, and Hilti, the resemblance of the marginal seas was so complete that they limited the zone with reference to the height reached by artillery upon the earth. (14) The same criticisms can be made against both, for, whether the zone be free subject to certain rights of protection or under the complete sovereignty of the State the dangers of allowing aircraft to meander above the zone are identical. Meyer grasps the point completely when he says, "The air is an appendage indivisible from the earth and any use made of it should be predicated upon the legal theory that recognises that fact." (15)

(14) Lycklama à Nijeholt, *La Souveraineté aérienne*, R.J.L.A. pp. 237-238

(15) Meyers, *Sovereignty of the Air*, Vol. 24. Green Bag, p.229.

Turning to those who maintained sovereignty subject to a servitude right of passage for aircraft we find as the protagonists, Westlake, who first propounded the view at the Ghent Session of the Institute of International Law in 1906, and Meurer. Here, at last, was an attempt to reconcile the two conflicting interests, that of the preservation of the State, and that of the unimpeded development of aviation. It is true to say that in the whole field of aviation law the difficulty in legislating for the use of aircraft, whether it be National or International legislation, lies in the reconciliation of these two interests, the safety of persons and property, on the one hand, and progress of aviation, on the other. Westlake and Meurer were aware of the fact, as were all the protagonists of the sovereignty school, and it is only a narrow line which divides the supporters of Westlake from the supporters of Hazeltine and the other full sovereignty theorists. To Westlake's supporters, the States must have full sovereign rights, but there is much to be said, in some respects, for the freedom school, therefore, let us have a servitude of passage for aircraft. To Hazeltine's supporters also, States must have full sovereign rights, but do not let us detract from these rights by allowing a servitude of passage to all aircraft as a matter of right. There must certainly be no impediment to the progress of aviation, therefore, let us allow freedom of passage by International Agreement. Neither of the conflicting interests will be affected by such an arrangement as this.

"as regards the aerial space. The only difficulty is that it is not possible to limit this aviation to a certain height. On the sea, the father people go from of International Law and his remarks, as given by Hazeltine, disclose such force of reason that it is illuminating to give them in full, bearing in mind the very early stage in the development of aviation law in which they were made. "I accept battle upon the "basis of the Report", he said, "that is upon the "principle of the liberty of the air, or more exactly, "of the aerial space. The air itself is something "that cannot be possessed. It is transported from "place to place at the will of the winds, today in "Belgium, tomorrow in France or in Holland; that which "we have around us is not air, it is aerial space. "Oceanic space and aerial space are two spaces upon "which the adjacent State has a "droit de conservation" "and the other State a "droit de passage innocent". "Conservation and passage - how can these two rights "be combined? Which of them is the rule and which the "exception? For the Reporter (Fauchille) it is the "right of passage which is first and fundamental. "For me it is the right of conservation. Of these "two rules, the one which deserves to be the rule is "the one which is the more precise; and yet the "droit "de conservation" is much clearer than the "droit de "passage". That is why the Institute, when it was "faced with this question a propos of the oceanic "space, replied that in the territorial sea the "droit "de souverainete" is the rule and the "droit de "passage" the exception. If that holds good as "regards the oceanic space it ought also to hold good

(17) Hazeltine, op.cit. p. 37.

"as regards the aerial space. The only difficulty is
 "that it is not possible to limit this solution to a
 "certain height. On the sea, the father people go from
 "the coast the less is the risk of their causing
 "destruction and disturbance upon the coast. In the air,
 "the higher one ascends, the greater becomes the
 "destructive force of objects thrown from the balloon
 "upon the earth. If there does exist a limit to the
 "sovereignty of the State in the oceanic space, such a
 "limit does not exist in the aerial space. The right of
 "the territorial State remains the same whatever the
 "distance from the earth." (16)

Westlake had travelled far along the lines of the
 supporters of complete sovereignty, but had been
 enticed into a loopline when he followed those who saw
 in the maritime law a precedent for aviation law. The
 appeal to compare the two as he has done must indeed
 have been great but he has ignored the fact, so
 concisely put by Hazeltime, that "whereas the maritime
 belt is not strictly necessary for the existence of the
 State, the air space is." (17)

The International Law Association must, however,
 be numbered amongst the supporters of Westlake, for,
 at the Madrid Meeting in 1913, the following resolution
 was adopted:-

(1) It is the right of every State to enact such
 prohibitions, restrictions, and regulations as it may
 think proper in regard to the passage of aircraft
 through the air space above its territory and territ:
 :orial waters;

(16) Hazeltime, Law of the Air, pp. 34-35, citation.

(17) Hazeltime, op.cit. p. 37. 46.

(2) Subordinate to the right of the subjacent State, liberty of passage ought to be freely accorded to the aircraft of every nation.

In December 1910, Dr. Hazeltime delivered three Lectures in the University of London at the request of the Faculty of Laws, and these were published in book form in June 1911. In the first Lecture he made an exhaustive study of the rights of States in the air space, and, after dealing with all the views expressed up to that date, he declared himself to be a supporter of the theory of complete sovereignty. Nevertheless, it is probable that Lycklama à Nijeholt must be credited with being the original supporter of this opinion, when, earlier in 1910, he stated, "We therefore conclude that State sovereignty reaches quite as high as the State's interest can reach, the possibility of which ends at the uppermost limit of the atmosphere.... in principle, the air space belongs to the sovereign state territory so that it has full sovereignty to an unlimited height, which sovereignty can only be abolished or restricted by Treaty." (18)

Hazeltime, who maintains that the views of those zone theorists, such as von Lizst, von Ulmann and Collard, who put their zones as high as can be reached by human means, are essentially sovereignty views based on the dangers incidental to aerial navigation, himself bases his arguments on the then existing legal rights which had been recognised. Primarily, various systems of law recognise the right of the owner of land to own it ad coelum usque ad inferos and this is

(18) Sovereignty of the Air, p. 46.

an implied recognition of the rights of the State to concede to the owners of land such a proprietary right. While this is so, the appearance of aircraft has caused many doubts to be cast on the maxim cuius est solum and, as we shall see, there are many who deny any such right to an individual landowner. But Hazeltine goes further, and points to the rights in the air space which had already been recognised. The fact that buildings had been erected in the lower stratum of the air space, that the right to shoot birds was recognised, and that laws had been made to regulate wire and wireless telegraphy and even aerial traffic (of the Ordinance of the State of Florida), were, in his opinion, clearly recognition of the sovereign rights of a State in the air space above its territory. He concludes by asserting that the uniform international regulation of aerial navigation will more readily be brought about by admitting the doctrine of sovereignty of the air space, than by denying it.

This was the position of the law at the outbreak of the World War in 1914. Unanimity on the question of sovereignty could not be attained - indeed, the Paris Conference of 1910 failed to agree on an International Convention for this very reason. How the declaration of war changed the whole position and made unanimity not merely a matter of academic desire but a matter of urgent necessity will be seen when we consider the effect of that crisis in its relation to the development of aviation law as a whole.

The Right to Fly - The National Law.

At the outset, reference was made to the maxim of the law cujus est solum ejus est ad coelum usque ad inferos. This maxim appears to be embodied in many national legal systems. How it came to be adopted as part of the law of such countries is doubtful, and diligent research has failed to produce any satisfactory solution. In fact, the origin of the maxim itself is so far unknown, but Guibé (19) has discovered that the earliest source to which it can be traced is to Accursius, the Bolognese glossator. It occurs in his Glossa Ordinaria on the Corpus Juris, the gloss being on the word coelum occurring in the Digest (20). It is in the following terms, "Nota:- cujus est solum debet esse usque ad coelum". A.K. Kuhn who has also endeavoured to trace its origin comes to a similar conclusion:- "It would seem rather to be the work of some gloss upon a passage in the Digest justifying the removal of projections from adjoining property over a place of burial, because to the sepulchre belongs not alone the ground enclosing the remains but everything up to the heavens: quia sepulchri sit non solum is locum quia recipiat humationem sed omne etiam supra id coelum".(21) The maxim was not, apparently, Roman, although somewhat similar sentiments are expressed in certain passages of the corpus juris civilis.

(19) Essai sur la navigation aerienne en droit interne et en droit international (Paris 1912).

(20) VIII. 2. lpr.

(21) Beginnings of an Aerial Law. 4 Ann. J. Int. Law 109, 123. (1910).

of the applicability of the maxim under the Common Law of the land. As far as aviation law was concerned, the origin of the maxim was relatively unimportant. It had majority of legal Codes. Once the principle of private ownership of land was accepted it would inevitably follow that to the individual landowner would be conceded the greatest possible rights of ownership. The cujus est solum maxim provided a neat and concise expression of the extent of these rights. At the time of Accursius there would be nothing to prevent a landowner from having proprietary rights ad coelum usque ad inferos, but the appearance of aircraft at once raised, in acute form, the question of how far the maxim actually did apply. Did a landowner have, in fact, full rights of ownership in the airspace above his land to an unlimited height? He had a right to the ground below the surface to an unlimited distance; that was a right clearly recognised by the law, but did it operate in the other direction? Could he claim a co-extensive right of ownership in the airspace above the surface of his land? If the maxim was to be interpreted literally, and according to the strict letter of the law, such a right would appear to be vested in him, and, proceeding further, once this right was maintained, flight could effectively be prevented. A balloonist could not move through the air without thereby trespassing and laying himself open to an action of damages for trespass at the instance of every landowner over whose land he passed. From the point of view of the aeronaut, such a position was intolerable. The law could be altered in the interests of aviation but the jurists of this period had to consider the question

of the applicability of the maxim under the Common Law of the land. As far as aviation law was concerned, the origin of the maxim was relatively unimportant. It had crept into the law at some fairly early stage in its development and had, to a certain extent, become part of that law. The question of importance was to what extent the maxim was applicable ad coelum. Was it absolute in its application or did it only apply within certain limits? If it did apply only to a limited extent was the mere fact of innocent flight an encroachment on the rights of the landowner or was it not?

As was usual in all such questions, there was a wide divergence of opinion. The landowner might have no rights in the airspace, but, on the other hand, it was equally possible that he did have some rights, and, if he did, what were they? They might be defined by the height of his buildings or even by the limit of effective possession of the airspace; or, they might be indefinite, sufficient merely to enable him to enjoy his rights of property in the land, or they might be absolute. It could even be that the landowner had only a servitude right to use the airspace above his land, a right which would be thereby accessory to his ownership of the land.

Before considering the English Common Law, and the difference, if any, under the law of Scotland, it is interesting to observe some of the views as to the extent of a landowner's rights in the air space adopted in other legal Codes. The Code of the Canton Grieson in 1862 is said to have provided that "property in land extends to the airspace above and the earth beneath so

"far as these may be of productive value to the owner." (22) Napoleon's Code and the old German Code gave the landowner full proprietary rights, while the Swiss Code and the later German Code, although both conceding full proprietary rights, laid down the principle that the landowner could only exclude persons from the use of the airspace above his land if he had an interest in doing so. (23). The American Law seems to have followed Napoleon's Code and the old German Code, for many lawyers have maintained that the right of flight in the United States does not exist at Common Law, and, as late as 1921, the Chief of the Army Air Service was advised by his legal adviser that such a right did not exist. It has also been suggested that flight would be possible only by Constitutional Amendment or by the acquisition of a right of way over private property. American case law, on the other hand, tends to adopt the view that innocent flight above a certain height will not in itself be a cause of action at the instance of a landowner. "The only decisions heretofore rendered in this country are two - one by a State District Court of Minnesota, and the other by the Court of Quarter Sessions of Jefferson County, Pennsylvania. Both Courts recognise that air navigation is lawful and does not constitute a trespass." (24).

It is extremely difficult to trace the effect of the maxim ad coelum either in the law of England or in the law of Scotland. In neither country can its origin be found. It has had a considerable effect on the

(22) Kuhn, op cit. p. 127

(23) Art. 905, 1919, Auto Act. Geo. v Schr 47. Entscheidungen des Reichsgerichts in Zivilsachen (Neue Folge) 25.

(24) F.P. Lee "Our Commerce Act of 1926", 12 Am.Bar Assc. Journal, 376. (1926).

development of the law in both countries but at no time has it been embodied in Statute or has it been the direct object of judicial decision. Yet, several decisions have been based on the assumption that it was part of the law, and the judicial references all treat it as so well founded that it was unnecessary to give a judicial decision that it was part of the law. Blackstone has said that the only way of proving that a maxim was a rule of the common law was by shewing that it had always been the custom to observe it. Judged by that standard, there can be no doubt that the maxim cujus est solum is part of the law both of England and of Scotland. The fact that difficulty is found in explaining the effect of the maxim ad coelum does not, I consider, justify the statement of Professor M'Nair:- "In itself it(the maxim) has no authority in English Law. Only in so far as it has been adopted as part of our law by the judges or by text writers of a very special degree of authority need it concern us. I venture to submit the view that the maxim has been grievously misunderstood and applied so far as its upward limit is concerned." (25) That is his considered view after a discussion of the dicta in which the maxim was referred to occurring in various cases concerning trespass and nuisance, cases concerning telephone and telegraph wires and the like, as well as the works of these writers who are authorities on the Common Law. But what are these cases and authorities and do they justify such a view? The maxim has been invoked in two classes of case, those dealing with the rights of the landowner ad centrum and those dealing with his rights ad coelum. His rights in the former case, i.e. ad centrum, had never been questioned and the maxim applies

(25) M'Nair, Law of the Air, p. 33.

to the full extent in that direction. It is in the upward direction that references to its application are so scarce.

The first case in England in which the maxim was referred to in this latter respect was the case of *Bury v. Pope* in 1556(26), a case dealing with light, in which it was held that a man can build on his own land in such a manner as to obstruct the lights of his neighbour's house which had been in existence for thirty or forty years. The report concludes "Nota - cujus est solum ejus est summitas usque ad coelum". In 1610, *Baten's case* (27) an overhanging portion of a house was treated in itself as a nuisance: "For in this case the defendant has built a new house, which overhangs part of the plaintiff's house (which was not in any of the other cases), so that of necessity the rain which falls from the new house must fall upon the plaintiff's house. And cujus est solum ejus est usque ad coelum.... also he has prevented them from building their house higher". The case of *Pickering v. Rudd* in 1815 has already been referred to for its early direct reference to the passage of a balloon over private property. The judgment of Lord Ellenborough which was quoted (ante p.4) marks the first attempt to limit the application of the maxim ad coelum, and it is significant indeed that the attempt should be made when first the flight of aircraft was in the mind of the judge. That must have weighed heavily with Lord Ellenborough when arriving at his decision, and, foreseeing as he did the impediment to aviation which would be occasioned by the strict application of the maxim, he felt constrained to limit its

(26) *Cro. Eliz.*, 118.

(27) *9 Rep.* 53, b.

application, not as a matter of strict law, but more as a matter of sound common sense. The next case, that of *Fay v. Prentice* in 1845, (28) is interesting in that the facts closely resemble the Scottish case of *Miln v. Mudie* which had been decided some years before, in 1828 (29). The facts in *Fay's* case were that damages were sought for nuisance in respect that a cornice built by the defendant upon his house projected over the plaintiff's garden and damaged it by overhanging it and shooting rain on to it. Although there was no actual damage proved, £40 damages were awarded on the ground that the bare existence of the projection was a nuisance, but the maxim was referred to as a mere presumption of law and one which would not apply in all cases. In *Kenyon v. Hart* (30) which was a case dealing with the shooting of a pheasant over the land of another, the decision in *Pickering v. Rudd* was considered, and Lord Blackburn declared that he could see the good sense but not the legal reason for Lord Ellenborough's doubts on the matter.

There are two other cases which deserve mention, both concerning the right to carry wires over the property of others. They are the cases of *Wandsworth Board of Works v. United Telephone Co.* (31) and the case which followed it and was decided along the same lines, *Finchley Electric Light Co. v. Finchley Urban District Council* (32). In the former case wires had been placed across a street at a height of thirty feet. While it was decided that this was no trespass, the decision turned on the rights of the Council in the street and it is the

(28) 1845, 14 L.J.C.P. 298
 (29) 1826, 6 S. 967
 (30) 1865, 6 B and S. 249
 (31) 1884, 13 Q.B.D. 904.
 (32) 1903, 1 Ch. 437.

opinions obiter which are of importance. Fry, L.J. said "As at present advised I entertain no doubt that an ordinary proprietor of land can cut and remove a wire placed at any height above his freehold", and Bowen, L.J., in the course of his opinion remarked, "If the Board of Works were in the position of simple owners of land..... I should be extremely loth myself to suggest, or to acquiesce in any suggestion, that an owner of land had not the right to object to anybody putting anything over his land at any height in the sky. It seems to me that it is not necessary to decide upon what exact legal fiction, or on the existence of what legal theory, one is to justify the principle which I think is embodied in the law, as far as I have been able to see, that the man who has the land has everything above it, or is entitled at all events to object to anything else being put over it." The decision in the Finchley case followed this view and in that case we find Lord Esher stating, "that the owner of land owns the soil below usque ad inferos and the column of air above usque ad coelum".

Taken by themselves, these decisions would not, I submit, justify the statement that the maxim is no part of the Common Law. On the contrary, while they are by no means illuminating, taken as a whole they do, in effect recognise the existence of a principle of the Common Law such as is embodied in the maxim, and the learned judges in so deciding receive valuable support from the two great authorities on the Law of England, Coke and Blackstone. The relevant passage from Coke (33) is in the following terms:- "And lastly the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; (33) Co. Litt. 4 a.

"for cujus est solum ejus est usque ad coelum, as is
 "holden 14 H.8. fo.12; 22 Hen.6.59; 10E.4.14. Registrum
 "origin and other bookes". Blackstone (34) is similar -
 "Land hath also, in its legal signification, an
 "indefinite extent upwards as well as downwards. "Cujus
 "est solum ejus est usque ad coelum, is the maxim of the
 "law upwards."

The Law of Scotland on this matter is equally
 vague. There is no real difference between the laws of
 the two countries, for in Scotland, as in England, the
 maxim seems to have been regarded as so much a part of
 the law that judicial decision as to its application
 was regarded as quite inappropriate. The Scottish
 Institutional writers have not enunciated a statement so
 clear and definite as those of Coke and Blackstone in
 England, although Bell does embody the principle of the
 maxim in his Principles of the Law of Scotland. There
 have been several decisions on the application of the
 maxim ad centrum but very few on its application ad
coelum. In all without exception, however, the maxim
 is treated as an integral part of the law. Two cases
 will serve to illustrate the position. The first is the
 case of Miln v. Mudie supra. The Report is exceedingly
 short - "In the erection by Miln and Mudie of their two
 contiguous houses, the former proposed to have a some:
 :what ornamental front, certain cornices of which
 projected a few inches across the centre line of a
 mutual gable between the two houses but without in any
 degree injuring Mudie's house. Mudie, however, so soon
 as they appeared declared he must have them knocked off;

(34) Commentaries, Vol.ii. ch.2. p.18.

"and on Miln's refusal he presented a Petition to the Dean of Guild to have him ordained to remove the cornices so far as they projected over the front of his house. This was opposed as being purely in emulatione vicini; but the Dean of Guild ordained the projecting cornices to be removed: "In an advocacy the Lord Ordinary and the Court remitted simpliciter, with expenses." It appears that the maxim was regarded definitely as part of the law and no grounds of judgment are given; there was no question but that the projections must be removed. In the later case of Glasgow City and District Railway Co. v. MacBrayne (35) the question at issue was the right of the landowner ad centrum but Lord McLaren, in the course of his opinion stated, "In the next place, I must hold it to be clear in law that a conveyance of land in unqualified terms gives a right of property in the substance or solid contents of land without any assignable limit. This is what is meant by a conveyance ^{being} a coelo ad centrum. There are no limits in the vertical direction except such as physical conditions impose". Thus, the Law of Scotland does not differ materially in this respect from the Law of England. No judicial decision has been given, or even judicial reference made, on the effect of flight, and it is perhaps to be regretted that the later Scottish writers have been compelled to refer to English decisions for guidance when this question has been raised. There is one other passage, however, given by Bell which should be mentioned, in view of the tendency of Lord Ellenborough and the other later English Text Writers to find, as it were, a loophole in the law as expressed in the maxim, whereby innocent flight would

(35) Bell's Principles, sec. 854

(35) 1883, 10 R 894.

be permissible. The passage which follows immediately on the dissertation on land ownership, is headed "Limitation of Exclusive Use" and proceeds, "The exclusive use of a landowner yields wherever public interest or necessity requires that it should yield". (36) Whatever may be the law in England, in Scotland at any rate, flight might have been justified on this principle of public interest.

While I do not intend at this stage to trace the development of the law further than to the outbreak of the Great War in 1914, since the only development of the law with regard to the maxim and its place in aviation law subsequent to that date is statutory, it is perhaps convenient to consider here the opinions of the modern writers to see whether the common law would in itself have justified a derogation from the strict interpretation of the maxim, in the interests of flight by aircraft. The case of *Pickering v. Rudd* in England, and the principle enunciated by Bell in Scotland could be taken as countenancing the view that this would be possible. Further confirmation may be taken, from a negative point of view, from the fact that so far no person has raised any objections to the flight of carrier pigeons. While, by merely crossing the land of another, they would not be likely to cause the same offence as an aircraft would, nevertheless, the problem which they present closely resembles that of the flight of aircraft. In both, the essential elements of a trespass are present, namely the property of one person entering the land of another, land being taken as including the whole space ad coelum. Yet

(37) 4. T.L.R. 8
 (38) 15th Ed. 1925 p. 351
 (36) Bell's Principles, Sec. 956.

no owner of carrier pigeons has been sued in trespass. The effect of the flight of bullets may be taken as settled judicially for, in the case of *Clifton v. Bury*, (37) while an injunction was granted, it was on the ground of nuisance and the Report indicates that the mere fact of bullets passing over land at a considerable height above the ground would not be actionable as a trespass. In both cases there is a limit to the application of the maxim.

Turning to the more recent writers, one finds Sir Frederick Pollock (38), after referring to the judgments of Lord Ellenborough in *Pickering v. Rudd*, and Lord Blackburn in *Kenyon v. Hart*, proceeding, "Clearly there can be wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books. It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession, which might be the most reasonable rule." He goes on to say that it would be doubtful whether the passing of the projectiles from modern artillery at a considerable height would in itself constitute a trespass. Sir John Salmond (39), on the other hand, definitely asserts that an entry above the surface is not in itself an actionable trespass "for such an extension of the rights of the landowner would be an unreasonable restriction of the right of the public to the use of the

(37) 4. T.L.R. 8
 (38) 13th Ed. (1929) p. 361
 (39) Torts, p. 237.

atmospheric space above the earth's surface." But he is forced to admit that "the state of the authorities is such that it is impossible to say with any confidence what the law on the point really is." Lastly, the references in Halsbury's Laws of England are of interest for in the title on "Real Property and Chattels Real" it is stated that "the strict right of property does not extend skyward without limit so as to entitle the owner to sue in trespass (*Pickering v. Rudd*) and the advent of airships has shewn that this would be impracticable", while in the title on "Boundaries, Fences and Party Walls" this somewhat contradictory sentence is found, "the surface boundary (of land) probably carries with it the right to the column of air over the land up to the sky, and certainly the soil to the centre of the earth, on the principle cujus est solum ejus est ad coelum usque ad inferos."

The law is difficult and confused. Authority can be found both for applying the maxim rigidly not only ad centrum but also ad coelum. Without statutory enactment, the position of aircraft was intolerable, but, this being so, the theorists were deprived of a judicial decision when a case on point before the highest tribunals would have been welcomed. Lacking such a decision one is left to conclude, in the first place, that before the advent of the aircraft, the cujus est solum maxim was generally regarded, and I consider rightly so, as being absolute in its application, and, in the second place,

(40) *Spraight, Aircraft in Peace and the Law*, p. 55.

(41) *Hazeltine, Law of the Air*.

that with the coming of aircraft, and other modern inventions, the application of the maxim ad coelum was questioned and it is possible that, both in England and in Scotland, justification could have been found for so modifying the law as to permit of innocent flight. While Dr Spaight was in all likelihood correct when he wrote, "It will probably be safe to leave it to the common sense of courts and legislatures to resist any attempt to uphold or re-instate a maxim which is utterly repugnant to the spirit of human progress", (40) nevertheless, the weight of authority is in the direction of regarding the owner of land as having absolute proprietary rights both ad centrum and ad coelum. The opinion of Dr Hazeltine is to be preferred to that of Professor M'Nair, when he writes, "I find it difficult to adopt the zone theory so far as the present law is concerned; for I find it difficult to hold that, on ^{the} general principles of the common law, as well as the civil law, the landowner's right either below or above the surface is in any way limited." (41) That is unquestionably the sound exposition of the law, applicable alike in England and in Scotland. Dr. Hazeltine was a supporter of absolute sovereignty and his views on the application of the ad coelum maxim are in conformity with his opinion on the question of sovereignty, for, if States are to be regarded as having sovereign rights up to an indefinite height, it must necessarily follow that the private landowner has co-extensive rights in his own piece of land. The maxim cujus est solum ejus est ad

(40) Spaight, Aircraft in Peace and the Law, p. 55.

(41) Hazeltine, Law of the Air.

coelum usque ad inferos gives him such rights.

The Pioneers of the Law continued - Other ProblemsChapter 3. of the Law.Nuisance:

While the problem of the right to fly was by far the most important question discussed by the early jurists, it being the fundamental question on which the development of aviation depended, the other problems raised by the flight of aircraft, both in times of peace and in times of war, were legion.

Closely identified with the tort of trespass, just discussed, was the tort of nuisance.

The decisions on the question of trespass just discussed have foreshadowed a certain degree of liability under nuisance. The tort of nuisance in

England is defined by Sir Frederick Pollock as

"the wrong done to a man by unlawfully disturbing

"him in the enjoyment of his property, or, in some

"cases, in the exercise of a common right", the

former being a private nuisance, and the latter, a public or common nuisance. In Scotland, no such

distinction exists, a nuisance being defined by

Bell thus, "Whatever obstructs the public means of

commerce and intercourse whether in highways or

navigable rivers; whatever is noxious or unsafe or

renders life uncomfortable to the public generally

or to the neighbourhood, whatever is intolerably

offensive to individuals in their dwellinghouses,

or inconsistent with the comfort of life, whether

by stench, by noise, or by indecency, is a

nuisance." (1) This definition embraces both the

common or public nuisance and the private nuisance

of the English law.

(1) Bell's Principles, Sec. 974.

Thus, in both countries, many of the claims which would have failed if brought on the grounds of trespass might have had more chance of success if based on nuisance. While an aircraft which was stationary - of necessity, at this stage, a lighter-than-air craft, although modern development shows that even heavier-than-air craft will be able to remain stationary for considerable periods - would not perhaps have founded a successful claim under trespass, it would in certain circumstances have done so as a nuisance, even although actual damage might not have been occasioned. For instance, a stationary aircraft might conceivably have the effect of frightening animals or even children. One of considerable size could easily have the effect of shutting out the lateral light and the privacy of the owner of the land might be invaded to such an extent^{as} to be a nuisance, for while an aircraft merely passing overhead could not be regarded as a nuisance just because the privacy of the landowner was affected, the position would be different if it hovered above his land for some little time. In all these cases an action for damages for nuisance would probably have been successful and the continuance of the nuisance restrained. The field of action would be extended when moving aircraft were considered. Foremost among the nuisances created by actual flight, is that of noise accompanied, in most cases, by continual low flying, especially in the vicinity of aerodromes. At common law this would unquestionably have constituted a nuisance, as would trick and experimental flying and the instruction of novices over populated areas.

Reference might be made to a very early Scottish case, one of the few cases in Scotland in which the

effect, or, perhaps more accurately the results of flight, have been considered, in which a claim for damages succeeded against a parachutist on the grounds of nuisance. It is the case of *Scott's Trustees v. Moss* (2). The facts were that Moss advertised a balloon ascent by one Prof. Baldwin, who, after rising to a certain height, would descend by parachute. This he did and landed in a field belonging to Scott's Trustees. The crowd overran the field and considerable damage to the growing crop resulted. The Lord Ordinary, who held that the action was irrelevant, in the course of his opinion remarked that a continued nuisance of this kind could be interdicted. On appeal, however, the decision was reversed and an issue for trial allowed on the ground that damages could be claimed for a nuisance without waiting for the second occasion envisaged by the Lord Ordinary.

Negligence and Damage:

Progressing still further, questions next arose as to the liability for actual damage caused either by an aircraft itself, or by articles falling or dropped from it. This matter centered around the common law rules as to negligence, and how far any special rule of law or of evidence in relation thereto, could be applied to aircraft. Damage could take many forms. It might be damage to property or persons carried in the aircraft; or it might be damage to the aircraft itself as the result of a collision; but, of still greater importance, it might be damage to third parties outwith the aircraft. The person on the ground "is beneath the sword of Damocles, and the sword is not even supported by the horse hair." (3)

(2) 1889, 17 R. 32.

(3) Baldwin, "Laws of the Airship", 4 Ann.J. Int.Law, p. 100. (1910)

It is to this latter category that I now direct attention.

It was trite law, both in England and in Scotland, and, for that part, in most other countries as well, that if a person was doing what he was lawfully entitled to do, he would not be liable in damages for injury to a third party, if this was the result of pure accident on his part. In other words, the injured party had to prove negligence. Under the Common Law of England negligence is a breach of ^a duty to use care according to the circumstances. It is a default in a duty owed to some person or persons. The Law of Scotland is similar in this respect - "negligence per se will not make liability unless there is first of all a duty which there has been failure to perform through that neglect." (4) The position, accordingly, was that, whether or not there was ^{liability} negligence, depended on the circumstances of each case, that is to say, on whether or not there was a breach of a duty owed to the injured party. With the coming of aircraft, it had to be decided, in the first place, whether the aviator owed a duty to any person or persons, and, in the second place, allowing that he did owe a duty, whether this could be raised to a duty to use care in a higher degree than was usual in other cases.

The first part of the question could easily be answered. It had been clearly held that the drivers of vehicles owed a duty to the public and that a similar duty was observed in maritime law. There could be no doubt that the aviator had a duty to take care. But the aircraft was a peculiar type of vehicle, and, especially in its early stages, was inherently dangerous. It was in this latter

(4) Clelland v Robb, 1911 S.C. 253, Per Lrd. Dunedin.

characteristic that it differed materially from the ordinary run of vehicles on the highway or ships on the sea. The fact that it was suspended in the air, and could make an involuntary descent at any moment, or that something might readily fall from it causing extensive damage, seemed to put aircraft into a special category, and there was, as will be seen, a strong tendency to apply a rule of absolute liability to aircraft for such damage.

However, in the rule res ipsa loquitur and in the doctrine expressed in *Rylands v. Fletcher* (5) the English and Scottish Laws had made a certain provision for dangerous things which might be applied to aircraft. The maxim res ipsa loquitur had the effect of moving the onus of proof from the injured party to the person causing the injury in the cases to which it could be applied, that is, in cases where the facts disclosed were such that an accident would have been extremely unlikely had there been no negligence. The rule was thus laid down in *Scott v. London Docks Co.* (6), "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary case does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The case in question was one in which sacks of sugar fell while being lowered from a warehouse. On the basis of this decision, therefore, it might be assumed that

(5) 1868, L.R. 3 H.L. 330.

(6) 1865, 3 H & C. 596.

the maxim would be applied to articles dropped or falling from aircraft. There can be little doubt that it would also have been applied in cases where the aircraft itself fell, for a person who goes up in an aeroplane knows that he must come down and the burden of showing that his coming down was the result of circumstances over which he had no control should rest on him rather than on the injured party. So it has been held in America that, when a person was injured in an elevator accident, the onus of proof was on the owners of the elevator. (7) It had been applied in cases where a bus skidded, and in recent years in Scotland, differing from England, it was applied in the case of a runaway horse. (8). That being so, having regard to their peculiar characteristics, it would surely be applied in the case of aircraft.

The doctrine expressed in *Rylands v Fletcher* was, perhaps, more important, although its application to aircraft was not clear. Shortly expressed, the doctrine is that any person who for his own purpose brings on his own land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie liable for all the damage that is the natural consequence of its escape. Vis major or the Act of God would alone excuse him. The application of the doctrine differed slightly in the two countries. In Scotland the tendency was to apply it only to cases where something potentially dangerous was brought on to land (9), whereas, in England, it had been applied in analagous cases. However, even in England, it had not been applied to motor vehicles on the highway or in similar cases. (10) The ground of such decisions was

(7) *Treadwell v. Whittier* (1889) 80 Cal. 574.

(8) *Hendry v. M'Dougall*, 1923, S.C. 378.

(9) *Reynolds v. Lanarkshire Tramways*, 1908, 16 S.L.T. 230.

(10) *Wing v. London General Omnibus Co.* (1909) 2 K.B. 652.

clear, for a car on the highway could not really be said to be inherently dangerous.

It has been said that "an aircraft is no more at common law a dangerous thing than a motor car." (11) Again, judicial decision, or even dicta, is lacking, but the fact that an aircraft is suspended above appears to me to cast grave doubts on such a statement. This was the essential difference between the aircraft and other vehicles, and, by that fact alone, an aircraft must be very near the border line of that class of objects that is classified as "dangerous things".

From the international aspect, also, the question of negligence and damage was important. The international character of flight made imperative uniformity of principles of negligence and damage. The position of the aeronaut would indeed be insufferable if he was subjected to different rules of liability in each of the different countries over which he flew. The consensus of opinion was that, as a general rule, the aeronaut should be made liable absolutely for damage caused by the fall of articles from an aircraft, or the fall of the aircraft itself. "It is not enough to shift the burden of proof and to admit an exception for force majeure. The doctrine of absolute liability should be substituted and force majeure should in no case be admitted as a justification."

(12) This was the view adopted by the Comité Juridique de l'aviation in 1912 and 1913, (13) and was also the opinion of Professor de Lapradelle and Dr Hazeltine.

(11) Charlesworth, Liability for Dangerous Things, 14.

(12) Spaight, Aircraft in Peace and the Law, 78.

(13) R.J.L.A. 1913, p. 71.

(14) 1912 S.B. v. Graf. 29 Entscheidungen des Reichsgerichts in Zivilsachen (Neue Folge) 171.

(15) R.J.L.A. 1912, pp. 215-217.

(16) La navigation aeriennne au point de vue juridique R.D.I. 1911, pp. 490-491.

Nevertheless, in an action against Count von Zeppelin in Germany in 1912, it was held that he was not liable for injuries caused to a person by his dirigible which broke loose after he had taken very exceptional precautions to prevent such an occurrence, (14) and the Verona Congress of 1910 maintained that indemnity should only be due when there was fault on the part of the aviator, inclining as it did towards the unrestricted development of aviation rather than the protection of innocent third parties.

The question of indemnity for damage - assuming that a uniform principle of absolute liability was attained - also caused much anxiety, for how would damages be recovered when found due to a national of one country by an aviator, national of another country? Many ingenious suggestions were put forward, but the most important were those of M. Hennequin and Professor Hans Sperl. The former proposed that the courts of the country in which the damage was occasioned should have exclusive power to try the cause (15) and the latter, a system of insurance and national clearing houses which, after paying any damages found due to their own nationals, would, in turn, recover those from the national clearing house of the country in which the aircraft causing the damage was registered. (16)

Carriage by Air:

Turning now to another aspect of damage - that occasioned to passengers and goods carried by aircraft - resort must be had to the rules applicable in the case of carriage by land or by sea. There are the two classes of carrier, the common carrier and the private carrier. In England and in Scotland, although the basis of the law is different,

(14) 1912 S.B. v. Graf.Z 28 Entscheidungen des Reichsgerichts in Zivilsachen (Neue Folge) 171.

(15) R.J.L.A. 1912, pp. 216-217.

(16) La navigation aerienne au point de vue juridique R.D.I. 1911, pp. 490-491.

the common law is that a common carrier - one who undertakes for reward to carry goods of all those who choose to employ him in the business which he carries on - is bound to carry the goods of the kind usually carried by him provided they are not dangerous, or insufficiently packed, that they arrive in time, that he has room for them, and that his charges are paid. His liability in respect of goods so carried is that of an insurer. A private carrier, on the other hand, that is, one who exercises his right to select the goods or passengers carried, is only liable for fault or negligence. Both common and private carriers are only liable for injury to passengers if they have been negligent. At Common Law also, a carrier, whether common or private, could take steps to limit his liability but this must be done in plain and unambiguous language. This power was, in the case of carriers by land, severely limited by the Carriers Act 1830 (17) which made it essential, if the strict liability was to be evaded, that special arrangements must be made with individual traders and public notice or advertisement to that effect was no longer valid although it was sufficient to print the conditions on the back of tickets or consignment notes if the parties sending the goods had fair notice of the existence of the conditions. The Carriers Act of 1830 did not apply to carriage by sea, but there was one peculiarity with regard to sea carriage, namely the implied warranty of seaworthiness given by the shipowner. Such a warranty was not given in the case of carriage by land. The carrier by land was only bound to provide a vehicle as fit for the purpose as care and skill could render it.

While it was evident that a code of law for carriage by air would be necessary, and particularly an international code, it was not difficult to apply the foregoing principles to carriage by air. There would be no difficulty in defining whether such a carrier was a common or private carrier by applying the definitions laid down for carriers by land and sea. The fact that a machine was used which flew through the air would not affect the question. The Carriers Act of 1830 would not apply to aircraft and, accordingly, a common carrier by air would be able to contract out of his liability as an insurer by public notice or advertisement. Lastly, it could be taken as decided law that a carrier by air would not be bound by any warranty of "air-worthiness" as in the case of the carrier by sea, even allowing that it was necessary to have a Certificate of Airworthiness, but would only require to supply a machine as fit for the purpose as would be required from a carrier by land. The warranty that a ship is seaworthy is peculiar to carriage by sea.

Collisions:

The third and last type of damage which could result from flight was that caused to the aircraft themselves as a result of a collision. On this subject there was no law which could be applied, and, while the writers of this period invariably discussed the matter of "collisions" the basis of their discourse was not so much what the law was, as what law would be applied in the case of a collision between aircraft of different nationalities and what courts would have jurisdiction. Accordingly, it is difficult to find any expression of opinion as to the actual law to be applied in any one country.

However, precedent could again be taken from other sources - the sea and the land. Collisions on land were invariably dealt with according to the common law rules of negligence and contributory negligence operated as a successful defence to a claim for damages. The maritime law of various countries was on a different basis, and under the Maritime Conventions Act of 1911 where two ships are at fault the loss caused by a collision is apportioned in accordance with the degree of fault attributed to each vessel by the court, thus differing from the older English Maritime Law where, in such a case the loss was divided equally. Aviation law could in principle follow either the law of the land or that of the sea. One thing had to be borne in mind, that there were certain defined "rules of the road" to be observed by vehicles on land and by ships on the sea, especially in the latter case. There were as yet no "rules of the air" although it was pre-supposed that there would be such rules, and, accordingly, it was not easy to determine which of two colliding aircraft was at fault. But, assuming that there were rules of aerial navigation, on what basis was a claim for damages as a result of such a collision to be determined? The inclination was towards applying a law, analagous to maritime law, which would in principle be agreed on internationally, and one finds this advocated by Dr Hazeltine and Dr Spaight. It was generally felt that this was one occasion on which the analogy of the sea could be applied in safety as, from the point of view of navigation, the sea and the air space were more or less akin to one another.

Collisions between aircraft, however, did not necessarily occur in the air. They required to manoeuvre either on land or sea before and after flight and they might collide while taxi-ing on land or water. With no law in existence it was to be presumed that, while still on land the ordinary common law rules of negligence and contributory negligence would apply, whereas, while manœuvering on the water, maritime law would apply but the learned jurists were strangely silent on this question, in so far as liability, apart from special legislation, is concerned. We shall see in due course the principles which were finally evolved.

Wrecks and Salvage:

A collision on the highway or at sea does not of necessity cause a wreck. On the other hand, it is difficult to conceive a collision between two aircraft in flight where one at least of the colliding craft was not wrecked. For this reason, it was usual for the early writers on aviation law to couple wrecks and collisions together and consider both topics at the same time.

The term "wreck" was strictly applied only to wrecks as peculiar to maritime law, but it was generally agreed that the maritime law of wreck and salvage could be applied to aircraft with little modification where the aircraft was wrecked at sea. The necessity for a uniform law as to wreck and salvage of aircraft could not be over-estimated, but it might be expected that the majority of wrecked aircraft would be found on land rather than on the sea. Now, when two vehicles were wrecked on the highway there was no

question of payment of salvage. Only maritime property could be the subject of salvage and the salvor who rendered assistance to wrecked vehicles on land had no claim against the owners thereof for his services. It might appear inequitable that those who rendered assistance to a large aircraft carrying a fair complement of passengers and goods which crashed on land should receive no reward unless the owners of the craft were prepared to pay for their services. Unless it was expressly enacted that such was to be the case they could have no claim at common law. In fact, it was very doubtful whether, if in similar circumstances on the high seas a vessel which rendered assistance would under the then existing maritime law be entitled to salvage. As was indicated by Dr Spaight, (18) when an aircraft crashed on foreign territory several parties might be interested in the wreck if the owner did not take steps to salve it - the finder, the landowner on whose ground it falls, or the State of the locus quo - but that was a matter, to decide which, international legislation was required. As an indication of the type of legislation which the jurists had in view, one can take the proposal of M. Fauchille (19) who suggested in his Code that, "Anyone finding a wrecked aircraft on land or sea must notify it to the municipal authorities of the nearest locality or of the first port at which he calls, within twenty four hours of finding it or reaching port. If the wreck can be identified it will be restored to its owner who will repay the salvor his

(18) Aircraft in Peace and the Law, p. 100

(19) Annuaire de l'Institut, 1911, p. 111.

"expenses and pay him a remuneration of five per cent. of the value of the wreck. Otherwise it will remain in the authorities' hands; the internal legislation of each country will fix the time within which the owner will be allowed to reclaim it," this clause being almost identical in its terms with that approved by the Paris Conference in 1910. Legislation along these lines would be necessary in the absence of any other law which could be applied.

Thus far, the whole matter of the law governing damage caused by aircraft, whatever its cause and whatever its nature, has been dealt with from the point of view of reparation for such damage once it had been occasioned, but of no less importance was the manner in which it was to be prevented. In other words, what steps were to be taken to minimise the danger caused by the flight of aircraft. This was not really so much a matter of law as of regulation, and the various pre-war regulations will be observed in due course. The question was dealt with automatically by the various national legislatures, at an early stage, in their normal functions of ensuring the safety of the persons and property of their inhabitants. The regulations invariably took the form of ensuring that the craft itself was airworthy and that the pilots and navigators were competent, or by one or other of those means. Certificates to that effect were issued after inspection and examination on the analogy of the automobile and its driver and the ship and its crew. The only question in dispute was just how stringent the provisions as to airworthiness and inspection of the craft before flight could be made without impeding the

development of aviation, and also how far such regulations could be made the subject of international agreement and recognition. the opinions of many, registration of a ship does not in itself confer nationality: Jurisdiction and the Law in the Air. nationality of its owners. The misconception of registration:

Flight further gave rise to innumerable questions in the realm of jurisdiction and also the laws to be applied with regard to acts done by persons on board an aircraft while in flight, but pre-requisite to any such discussion was the necessity of deciding whether or not an aircraft had, or could have, a nationality. The aircraft could be likened, on the one hand, to the ship, or, on the other, to the automobile - it was neither the one nor the other, but, nevertheless, it had characteristics of both. It might have the full-blooded nationality of the ship or it might only have a nationality for the same purposes and to the same extent as that possessed by the automobile. It was universally recognised that, for the purposes of international flight, an aircraft would require to be registered in some State. That it would also require a nationality was not so generally acknowledged and even Meili was not emphatic that aircraft required no nationality. Such, however, was the view of only a small minority. The consensus of opinion favoured the conferring of a nationality of some kind on aircraft, but among this majority, while there was unanimity that an aircraft should have a nationality, and one only, confusion reigned as to how that nationality should be determined and the relationship between nationality and registration, particularly the purpose of the latter, a confusion which could in no small measure be attributed once again



"former will greatly simplify the law". (21) He was to the seductive analogy of the sea, and a failure to then referring to the view expressed by the Comité Juridique International de l'Aviation Aérienne in its registered. Contrary to the opinions of many, registration of a ship does not in itself confer nationality of its owners. The misconception of registration actually conferring nationality is clearly visible in the various arguments which were put forward for conferring this or that nationality on an aircraft.

There were two suggestions for conferring nationality through the medium of the owner of the aircraft. The first was that it should have the nationality of its owner's national State, and the second, that of the country of the owner's domicile. De Lapradelle held ^{the first} this opinion for three reasons, "two of them firmly established, namely diplomatic immunity, protection and requisition by the State of the Flag, the third dependant upon the solution which may be given later to the question of extraterritoriality, namely, the determination of criminal and civil competence by the "Law of the Flag", (20), and he was supported by Von Bar in the Code which he presented to the Institute at Madrid in 1911, and by Fauchille who had first raised the point in 1900 in the two projects which he submitted. The second, that of the domicile of the owner, was one of the alternatives adopted by the Paris Conference in 1910, and the French Décret of 17th December 1913, was similarly based on that principle. Dr Hazeltine favoured the first, for, "as between the two, I confess the first seems to me to be the safer and better principle both for times of peace and times of war.....the adoption of the

"former will greatly simplify the law". (21) He was then referring to the view expressed by the Comité Juridique International de Locomotion Aérienne in its "Code de l'air" adopted at its Paris Session in 1911 - "La nationalité de l'aéronef est celle de son propriétaire". Professor Oppenheim suggested the Port d'attache (22) and M. Armengaud the country in which the aircraft was constructed (23) as the true criterion of its nationality, but the greatest body of support was to be found for the view that nationality should be that of the country in which the aircraft was registered. This was the official view of the Fédération Aéronautique Internationale, and also that of the Institute of International Law, which, despite the projects submitted by Fauchille and Von Bar, finally resolved that "Tout aéronef doit avoir une nationalité et une seule. Cette nationalité sera celle du pays où l'aéronef aura été immatriculé..... L'Etat auquel l'immatriculation est demandée détermine à quelles personnes et sous quel conditions il peut l'accorder." (24) It was also favoured by Dr Spaight who, however, somewhat qualified his acceptance of the principle by requiring the aircraft to be normally housed in the State in which it was registered. "The aircraft should be regarded as having some fixed Port d'Attache" or headquarters and it should be registered in the country in which the headquarters are situated." (25) The question was one on which there had to be international agreement, but it fell to be decided more on the basis of convenience than on legal precedent. It was a simple matter in comparison with

(21) The Law of the Air.

(22) Annuaire de l'Institut, 1911, pp.307-310.

(23) R.J.L.A. 1912, p. 114.

(24) Resolution 2(a)

(25) Aircraft in Peace and the Law, pp.20-21.

the questions which were to be determined once a might apply; finally, the law of the country over whose nationality or quasi-nationality had been attributed territory the aircraft was flying could be applied. Much to the aircraft - questions which were wholly theoretical and on which there was no precedent.

These questions covered a very wide range, in fact on the delicate question of whether or not a State was every act done on board an aircraft had to be envisaged. Crimes and torts committed by the passengers or crew while the aircraft was in flight, contracts executed on board, births, deaths or marriages occurring on board - by what law was their legality or otherwise to be determined? Furthermore there might be violations of a State's flying regulations and of international conventions but these would arise at a later stage when national regulations and international conventions were a reality and it was to be hoped that there would be international agreement in the conventions themselves as to the appropriate tribunals in which such offences could be dealt with. Failing this, their decision would also be a matter of legal theory just as the law to be applied in the other matters indicated above was entirely hypothetical. Even allowing that all such matters were dealt with by international convention, unless such agreement was universal there would always be cases which would arise in which resort would have to be had to the law, if there was any, which existed apart from the conventions.

Whether it was a crime, a tort, or a contract there might be no fewer than three criteria by which the law applicable and the courts having jurisdiction could be determined. The individuals concerned would have a nationality and the law of their national state could be applied; the aircraft might be regarded as having a nationality much as a ship had and the "law of the flag" generally recognised by all civilized States, such as

might apply; finally, the law of the country over whose territory the aircraft was flying could be applied. Much depended on the effect of, or rather, the extent of the nationality to be given to an aircraft, and still more on the delicate question of whether or not a State was to have sovereign rights in the airspace above its territory. Assuming, however, that an aircraft had a nationality which could be regarded as "full-blooded" in certain circumstances and that each State had sovereign rights in the airspace, what would be the position? In some cases no difficulty could arise. If an English aircraft carrying English passengers was flying between two places in England and a crime was committed on board, or a contract entered into between two parties on board, only English ^{law} could be applied. For what reason it might be difficult to say, whether it was the nationality of the passengers, or of the craft, or of the atmosphere through which they were passing, which was the determining factor no one was bold enough to explain. It would be taken for granted that English Law would apply and that English Courts would be competent to hear any subsequent judicial proceedings, for no other law could possibly have any bearing on the matter. But the case might not be quite so simple. Had there been domiciled French passengers in a German aircraft flying over England, would the law of England have prevailed? It will perhaps be more convenient to consider each case separately.

Crimes: *be tried in England.*

In the example given above - the Frenchman in the German aircraft flying over England - numerous different circumstances in which a crime could be committed could be comprehended. Assuming that one of the crimes generally recognised by all civilised States, such as

murder, had been committed on board while over English territory. One Frenchman had murdered another. If the aircraft had been merely crossing England on an international flight, while the crime was committed in English territory, that country would have no real interest in what happened on board. If the craft first landed in Germany, it was to be presumed that that country would have jurisdiction, on the assumption that the aircraft itself was to be given German nationality to the same extent as if the crime had been committed on a German ship. This was the opinion of M. Fauchille and of the Comité Juridique de l'Aviation. It would also meet the case of a crime committed over the high seas. Yet, to attribute nationality to such a high degree to the aircraft itself might be to make the position absurd. It would mean that if the German aircraft was making a flight between two places in England and the Frenchmen came on board in England intending to land in that country, and the same crime was perpetrated, then the German Courts would have to take cognisance of the crime. Nevertheless it was to all intents and purposes an English crime, committed in England, and one in which Germany had no interest. In such a case only the English courts could have jurisdiction and the fact that the murder was in an aircraft in the airspace must make no difference. It was generally recognised that the offender could, and would be tried in England.

The whole matter bristled with complications. The crime might be only a crime according to the law of the State through whose aerial domain the craft was flying. It might be a technical offence - the contravention of a Statute - and yet a crime. The aircraft might never

land in the State, the laws of which it had contravened, and the State whose nationality it possessed might not recognise the offence. How was redress to be obtained? A case presenting much the same difficulty, but with a more serious offence, could also be imagined, - one hypothetical yet possible. Taking once again the German aircraft with its French passengers over England on an international flight, the Frenchman on this occasion murdered an Englishman, say by shooting him from the moving aircraft. The machine landed in Germany. This was an offence in which the English Courts should have jurisdiction but could not the German Courts equally well punish the offender? In the matter of crimes the nationality of the offender had to be disregarded, and, accordingly, whatever the crime was, be it of a serious or trivial character, there were the courts of only two countries which had jurisdiction, those of the "State of the Flag" and those of the State over whose territory the aircraft was when the crime was committed.

Both had an equal claim to recognition and the one could not have absolute jurisdiction to the exclusion of the other although this contention was maintained by some. The support given to the "State of the Flag" theory has already been mentioned. That the law of the subjacent State should always apply was open to grave criticism largely on account of the difficulty sometimes in deciding over what particular State the aircraft was flying, especially near the frontier lines between various States. Even this difficulty, however, was surmounted by its protagonists, and a most ingenious

proposal was made by Guibé, (26). He foresaw the difficulty of drawing a frontier line in the air and proposed rather a volume frontier, within which the two States would exercise a concurrent jurisdiction, and where it was impossible to decide in what territory a crime, or, for that matter, any act, was committed, it would be regarded as having taken place in the common zone. The State first seised of the act would be competent to deal with it. Despite such suggestions, however, it was evident that a type of joint jurisdiction would have to be recognised, if only for convenience. The legal reasoning, of course, depended entirely upon the nationality to be attributed finally to aircraft and on the ultimate agreement on the question of sovereignty, but the correct solution was, I think, to be found in the writings of the two eminent English authorities, Dr. Hazeltine and Dr Spaight. The former wrote (27) "I believe the proper solution is to recognise the full sovereignty of the subjacent State in its entire airspace, thus bringing all crimes committed in that airspace within the jurisdiction of the Courts of the subjacent State itself. To be sure, it is still possible to give the State of the Flag a concurrent jurisdiction in regard to crimes committed on board which do not in any way seriously affect the subjacent States". At a later stage, one finds a similar expression by Dr Spaight, although in a more definite form. He maintains (28) that murder and other "common law" crimes committed in the air, whether

(26) *Essai sur la navigation aérienne*, pp. 224-227

(27) *The Law of the Air*

(28) *Aircraft in Peace and the Law*, p. 129.

(29) *droit aérien*, p. 182.

affecting persons on the ground or only those within the aircraft itself would come under the jurisdiction of either the subjacent State or the State of the aircraft's nationality; that all acts done in the air by a person taken up at one point in a country and set down at another, without having crossed the frontier, would be treated as done on the ground; and technical infringements of a State's laws would be dealt with only by that State. This latter suggestion rather pre-supposed an extension of the principle of extradition, in which both M. Fauchille and Professor Catellani (29) saw a possible solution to many of the difficulties.

Torts:

Entering the field of torts, one finds, that, differing from the law in regard to crimes, recourse can and will be had, to the nationality of the individuals concerned, or rather, to the country of their domicile, in determining the courts having jurisdiction, for there is something personal about a tort, affecting as it does the individual rather than the State. It was here that the whole question of redress for damage caused by an aircraft or by the persons therein found an outlet, and the tendency was to regard the matter as being readily determined in accordance with the existing rules of private international law. National courts would decide actions brought before them by reference to the law as settled by statute and judicial decision.

The same circumstances as were considered in the case of crimes could be taken, in the same order, as examples in the case of tort. If the Frenchman

(29) *Droit Aérien*, p. 152.

committed a tort on board the German aircraft while flying over England, but without landing, the English Courts would not be concerned, but the German Courts would not necessarily be competent to deal with the offence. Rather would it be the French Courts, the courts of the country in which the tortfeasor could be served with a writ and it would be tried according to the law of France. If the tort had been committed while the aircraft was in flight over the high seas it is doubtful whether, even in that event, the German Courts would have had jurisdiction. That would be the law which would be applied had the act been done on board a German ship but then an aircraft did not necessarily possess nationality to that extent. It was more probable that once again the French Courts would have to apply French Law. If the tortfeasor could competently be brought within the jurisdiction of the French Courts by service of a writ then they would be competent. Such would be the law in England (30) if the tortfeasor could be brought before the English Courts, and the common law or the maritime law would according to the circumstances of the case be applied.

In the third example, where an Englishman was murdered, England, as the subjacent State, was interested in the offence, and it was decided that both the English and the German Courts should be competent. Had it been merely a tort, the German Courts would not be competent but England, the subjacent State, would have an interest, and a very real interest. If the

(30) cf. *Submarine Telegraph Co. v. Dickson*, 1886, 33 L.J.C.P. p. 139.
Chartered Mercantile Bank of India v. Netherlands India Steam Navig. Com. (1882) 9 Q.B.D. 118;
 (1883) 10 Q.B.D. 521.

tortfeasor landed or could be brought before the English Courts by service of a writ, then they would have jurisdiction. In all probability, however, he might not land, and in that case he would be dealt with by the French Courts in the same way as though the tort had been committed in France and in no way affected English persons or property - that is, he would come before the courts of the country in which he could competently be cited to appear. There would be this difference. The French Courts would have to regard the law of England in deciding whether or not a tort had, in fact, been committed.

Questions arising as a result of collisions between aircraft fell into the same category but they were considered of such importance by the early writers as to deserve special mention and were usually treated separately. All the possible laws to be applied and courts to have jurisdiction found prominent supporters. Thus, where there was a collision between two aircraft of the same nationality M. Fauchille (31) suggested that the law to be applied and the courts to apply it should be those of the "State of the Flag", but where the colliding aircraft were of different nationalities such matters should be determined by the same rules as governed collisions at sea. Professor von Bar (32) would have applied this latter test in all cases of collision. There was but one alternative, that the law of the subjacent State should apply and this was the

(31) *Annuaire de l'Institut*, 1910, p. 108.

(32) do. P. 46.

(33) *Essai sur la navigation aërienne*, pp. 339-340.

theory supported by Dr Guibe (33). Had the collision occurred over the high seas he conceded that the law of the defendant's State would apply. However, there could be no doubt that to obtain redress for injury resulting from a collision, the injured party, in deciding before what courts his action was to be raised, would be guided by the same principles as would govern torts generally.

Contracts and Wills:

Somewhat similar considerations arose with regard to contracts entered into and wills executed by persons on board an aircraft in flight. Their form and mode of execution, their legal validity, and, in so far as contracts were concerned, their breach, had all to be taken into account in relation to the law by which such form, essential validity, or breach was to be determined.

It was trite law that the law of the country or place where a contract is made or entered into, the lex loci contractus, governs the form and mode of execution, and it must be lawful in that country and its performance lawful in the country in which it was to be performed. The difficulty was that when a contract was entered into between two persons in an aircraft in flight, where was it made? Following the principles adopted when dealing with crimes and torts, when the aircraft was engaged in an internal flight, say over England, the contract would be regarded as having been made in England, just in the same way as if it had been entered into while the contracting parties were on the ground. Further,

(33) Essai sur la navigation aérienne, pp. 339-340.

there would be no real difference if the aircraft contracts and wills were executed according to the law of the country in which they were made, and, in circumstances would differ slightly, however, if the deciding state country. regard would be had to the same contract was entered into while over the high seas. principles as guided the choice when discussing contracts. If English law was to be followed, it was probable with this exception, that when the instrument was that the courts of whatever State before which executed over the high seas, it would be more probable questions on the contract were brought would inter: that the law of the country in which the grantor was :pret such contracts made or intended to be performed domiciled, would be the ruling factor governing its over the high seas in accordance with the laws of execution.

that State. This could not be taken as definite, Births, Deaths, and Marriages: however, for there was something to be said for These topics, although of no real significance, applying the law of the State of the Flag in such were early discussed. Their decision depended on the cases, so much, in fact, that subsequent international nationality to be given to the aircraft. If it was to agreement all but made this the law. Dr Spaight be treated as part of the territory of a state, would have applied the law of the country in which analogous to the ship, then a person/onboard would have the contract was intended to be performed, the lex the nationality of the State of the Flag, and a loci solutionis. In fact he would have gone further, marriage solemnized on board would also require to be for he would have applied the lex loci solutionis in in conformity with the laws of such State. Some of the the prior two cases, where the aircraft was flying members of the Comité Juridique de l'Aviation did in over the territory of a state. (34) There was indeed fact make such a suggestion with regard to births. much to be said for such a view which would have Indeed, they went further and discussed the question of simplified matters considerably. The breach of a an infant stowaway found on board. The Comité decided contract would be determined by the same principles. that such a child should have the nationality of the

The form and execution of wills presented State of the Flag, a decision which was not upheld by less difficulty. They must of necessity be executed the Congress. The more common sense course, that according to the law of the country of the testator's suggested by Professor de Lapradelle (35), was that domicile. If they deal with heritable, or immovable, a child born on board an aircraft in flight should have property they must be executed in such a way as to its father's nationality, and that in the case of the effect a disposal of such property in the country in infant stowaway, domicile should determine its which it is situated. Legal instruments, other than nationality.

It had to be recognised that an aircraft

(34) Aircraft in Peace and the Law, pp. 127-8.

(35) R.J.L.A. 1912, pp. 246, 247, 253.

contracts and wills would be executed according to the law of the country in which they were made, and, in deciding such country, regard would be had to the same principles as guided the choice when discussing contracts, with this exception, that when the instrument was executed over the high seas, it would be more probable that the law of the country in which the grantor was domiciled, would be the ruling factor governing its execution.

Births, Deaths, and Marriages:

These topics, although of no real significance, were early discussed. Their decision depended on the nationality to be given to the aircraft. If it was to be treated as part of the territory of a state, analogous to the ship, then a person^{born}/onboard would have the nationality of the State of the Flag, and a marriage solemnised on board would also require to be in conformity with the laws of such State. Some of the members of the Comité Juridique de l'aviation did in fact make such a suggestion with regard to births. Indeed, they went further and discussed the question of an infant stowaway found on board. The Comité decided that such a child should have the nationality of the State of the Flag, a decision which was not upheld by the Congress. The more common sense course, that suggested by Professor de Lapradelle (35), was that a child born on board an aircraft in flight should have its father's nationality, and that in the case of the infant stowaway, domicile should determine its nationality.

It had to be recognised that an aircraft

(35) R.J.L.A. 1912, pp. 246, 247, 263.

Chapter 4. ? could have no such nationality and once this was so such matters presented little difficulty. The question of births occurring on board was the most important, and for British subjects, nationality was regulated largely by Statute, the effect of which was to bring all persons born within the British Dominions, or born of British parents outwith the British Dominions whose father was at the time of birth a British subject, if certain conditions as to registration were fulfilled, within the status of British subjects. Persons born in an aircraft over the high seas would fall within the latter category, and thus, for British subjects at least, the question lost much of its significance.

Nationality had even less importance on the question of deaths occurring in aircraft and the solemnisation of a regular marriage was difficult. Marriage, however, was possible to British subjects by mere exchange of consent in presence of witnesses much on the same basis as the old Scottish irregular marriage by declaration de praesenti.

two existing fighting services. It could be used to considerable advantage with either service.

Accordingly, it was to the formulating of a law for the use of aircraft in war that the energies of the early jurists were first directed, and, although in the course of their deliberations they touched on the many other matters I have just discussed, these were only the outcome of their consideration of a war time law.

In what respect then, did the use of aircraft during war require regulation? The question of

Chapter 4. The Pioneers of the Law, continued - Projects for
Regulating the Use of Aircraft in War.

In the introductory chapter I referred to the fact that the earliest attempts to legislate for the regulation of aircraft were, in the main, directed towards formulating rules governing their use in times of war, and it is true to say that until the conclusion of the Great War practically all the aerial laws enacted, had been enacted for military reasons. Certainly this was so until 1914. All the national aerial laws were enacted for purposes of national protection and the only international laws agreed upon, so far as referring to aircraft, were intended to cover their use in any future war. Admittedly the references were scanty, and much was left undone, but it is in this particular branch of the law that the first actual international legislation is to be found.

At the outset, the aircraft was regarded solely as a new weapon of war, and an adjunct to the two existing fighting services. It could be used to considerable advantage with either service. Accordingly, it was to the formulating of a law for the use of aircraft in war that the energies of the early jurists were first directed, and, although in the course of their deliberations they touched on the many other matters I have just discussed, these were only the outcome of their consideration of a war time law.

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Sovereignty in the airspace naturally occupied a prominent position, but this was of a more general nature and I have already dealt with it as one of the fundamental problems of all flight. The members of the other fighting services were specially identified by uniforms and belligerent vessels were distinguished in certain respects from peaceful trading vessels. If aircraft were to be used in war their crews would require in some way to be distinguished from the civilian population, that is if they were to have the benefit of the rules of warfare for the treatment of combatants as opposed to non-combatants. Similarly belligerent aircraft would require to bear some characteristic marks if civilian aircraft were not to be mistaken for fighting craft. No more suitable medium for espionage could be found than the use of aircraft and it was not difficult to foresee how confusion might arise which would result in the innocent occupants of a civilian machine being treated as spies. It was, therefore, essential that there should be some regularity of principles by which the fact of whether or not the occupants of an aircraft were guilty of espionage could be ascertained. The position of neutral States must be carefully safeguarded and that of neutral aircraft made clear. More important still, the question of the use by belligerents of the airspace above neutral territory must of necessity receive the most careful consideration for the gravity of the problem could not be over-estimated. A neutral State in which these problems were solved. The attempts at solution may conveniently be divided into two classes, the first embracing the references in

International Conventions and Declarations, and the would require to be protected from the possibility of an armed combat occurring in the airspace above it, and, of no less importance, was the question of the treatment to be meted out to a belligerent aircraft which, quite innocently, found itself over neutral territory, or, was forced into neutral territory by the elements, or even forced to land, all circumstances which the particular character of flight made abundantly possible. Yet one other problem loomed dark on the horizon. Under the then existing rules of warfare, be it on land or on sea, the position of the civilian population had been scrupulously safeguarded, although, apart perhaps from the possibility of bombardment by heavy artillery, the position of the non-combatant population was comparatively secure, - secure, at least, in comparison with the terrible dangers to which it would be exposed with the indiscriminate use of aircraft by an unscrupulous belligerent. No profundity of thought was required to contemplate the complete annihilation of the populace of large cities, or, indeed, of the whole civilian population, by one short, well planned, aerial attack, with weapons, the use of which was prohibited by the international rules of warfare in so far as the navy and the army were concerned. Here at least was one problem crying aloud for solution.

Consideration must now be given to the way in which these problems were solved. The attempts at solution may conveniently be divided into two classes, the first embracing the references in

International Conventions and Declarations, and the second, the attempts of and suggestions by the individual jurists. This latter class consisted

The year 1899 saw the First Hague Conference, and largely of attempts to draft International Codes of law, and I intend after discussing the first class, to base my consideration of the second on a comparison of these Codes, which were all founded on that of M. Fauchille, being the most comprehensive and complete.

From 1794, balloons seem to have been used regularly in warfare, but it appears that not until the Franco-Prussian War was the first public announcement made as to their use and the treatment of their occupants. In 1870, Bismarck announced that the persons on board captured balloons would be considered spies, "comme ceux qui fereient des tentative semblables par la voie ordinaire."

Two years prior, however, in 1868, came the Declaration of St. Petersburg that war was a contest between armies rather than people and that the only legitimate object of war was to weaken the military forces of the enemy. This might be conveniently taken as the foundation of the aerial war code. So also the further Declaration that the use of projectiles weighing less than fourteen ounces which were explosive or charged with fulminating or inflammatory substance was prohibited, would apply to aircraft. In 1874, at the Brussels Conference, a Resolution was submitted to remove "individuals sent in balloons to carry dispatches and generally to keep up communications between the different parts of an army" from the status of spies, and in 1880,

Warfare provided that the attack or bombardment by the Institute of International Law confirmed this principle.

The year 1899 saw the First Hague Conference, and although aviation was in its infancy and flight by heavier-than-air craft unknown, one finds the following Declaration:-

"The Contracting Powers agree to prohibit for a period of five years the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. The present Declaration is only binding on the contracting powers in case of a war between two or more of them. It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-contracting power."

The further 1899 Declaration prohibiting generally the use of projectiles, the sole use of which was the diffusion of asphyxiating or deleterious gases would also apply to aircraft.

The second Hague Conference did not meet until 1907, two years after the foregoing Declaration had ceased to have effect. It, however, confirmed the Declaration in all respects, except that it was now to remain effective until the close of the Third Peace Conference, which never met. Nevertheless the Declaration was of little worth as there were many abstentions from it and the nations which did not adhere reserved to themselves the right to bomb any place which could be regarded as "defended".

While the 1899 Declaration was re-affirmed, the Second Peace Conference took still further steps towards providing for the use of aircraft in war and individuals sent in balloons to send dispatches, these are to be found embodied in the Regulations on Land Warfare and in the Convention respecting Naval Bombardment. Article 25 of the Regulations of Land

Warfare provided that, "the attack or bombardment by any means whatever, of towns, villages, habitations or buildings which are not defended is forbidden." The provisions of the Convention respecting Naval Bombardment were to be found in its first article whereby "the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is prohibited," and in Article 2, which excluded from the prohibition "military works, military or naval establishments, depots of arms or war material, workshops or plant, which could be utilised for the needs of the hostile fleet or army and the ships of war in the harbour". The effect of the Articles was to prohibit absolutely bombardment from the air of towns, villages, habitations and buildings which were not defended, that was, if the words "by any means whatever" occurring in the Land Warfare Regulations were taken as applying to aircraft, the construction which had apparently been contemplated by the Conference. Even then the reference was far from complete, and, as was indicated by Dr Spaight, taken literally, it succeeded in taking from the combatant airman his only means of defence and retaliation if he himself was attacked from below. (1)

The Land Warfare Regulations also made reference to espionage, a matter, which, as has been seen, had already been touched on in 1874 and again in 1880. While not defining who would be guilty of espionage, from the air, Article 29 inter alia provided that "individuals sent in balloons to deliver dispatches, and generally to maintain communications between the various parts of an army or a territory" should be regarded as falling within the class of persons which

(1) Aircraft in War, p. 31

would not be considered guilty of espionage.

Article 53 dealt with the manner in which land forces were to treat aircraft found in invaded territory,

"An army of occupation can only take possession of cash, funds, and realisable securities, which are strictly state property, depots of arms, means of transport, stores and supplies, and generally all movable property of the State of a nature to be of use for operations of war.

"All means employed on land, at sea, or in the air for sending messages, for the carriage of persons or things, apart from cases governed by maritime law, depots of arms and generally all kinds of war material may be taken possession of, even though belonging to private persons, but they must be restored, and the compensation to be paid for them shall be arranged for on the conclusion of peace."

Lastly, by Article 23 (e), the use of arms, projectiles, or materials calculated to cause unnecessary suffering was prohibited. This rule also would require to be observed by airmen engaged in aerial war: :fare.

The foregoing provisions indicate the full extent of international commitment as to the rules governing the use of aircraft in war. The individual writers went further, indeed they comprehended a rapid development of flight and their proposals were far reaching. Foremost among these was M. Fauchille who drew up a very extensive Code consisting of two parts, a Peace Code and a War Code. In the former, the principal provision was his declaration of freedom of the air, and his whole Code must be considered in the light of such an opinion.

M. Fauchille's War Code (2) was divided into four Chapters, and the first of these consisted of one Article defining the theatre of aerial war. Warlike

(2) For prints of this Code and also the others to be mentioned see Appendices in Spaight, "Aircraft in War."

acts could be committed by belligerent States above their own territories, the sea bounding their coasts and above the open sea. Such operations which were likely to cause damage were prohibited above the territory of neutral states, at whatever height, as also in the neighbourhood of these States, within a radius determined by the force of the cannon of their aircraft. The authority of the neutral State had to be obtained before a belligerent State's military or public non-military aircraft would be allowed to circulate above such neutral State, but both public and private craft were forbidden to remain above a neutral country within a certain radius of the other's frontier. This latter provision prevented a form of espionage by which much valuable information of the enemy's movements might be obtained. The Article ended by declaring that the circulation of aircraft in war time was subject to the same restrictions as during peace.

Along with this Article, may be taken Article 19 in the Chapter defining the relations of neutrals and belligerents, for in this the rights of belligerents in neutral atmosphere are more explicitly given. Military aircraft of belligerents must not remain in such air space for more than twenty four hours, unless prevented by damage or weather conditions, and if the aircraft of two belligerents happen to be there at the same time, twenty four hours must elapse between the departure of the one and of the other. Unless there are particular circumstances, the order of departure is determined by the order of arrival. While in

neutral atmosphere belligerent aircraft may not do anything to augment their military power and the position of ^{the} neutral state must not be prejudiced by their presence. The only acts they can do are those which humanity cannot forbid and which are indispensable for enabling them to reach the nearest point in their own or an allied country. The Article concludes with the declaration that the Hague Convention of 1907 relating to neutral rights and duties in Maritime War is generally applicable to aerial war. The provision that military aircraft must not do any act which would augment their military power would appear to cover any contingency provided for in the first Article prohibiting flight within a certain radius of the other belligerent's frontiers.

Other Codes were proposed by M. D'Hooghe, the President of the Comité Juridique International de L'aviation, by Professor Von Bar, M. le Moyne, and M. Philit, while the only British attempt was that of Dr Spaight. M. D'Hooghe's Code was identical in most respects with that of M. Fauchille but, unlike Fauchille, he was of the opinion that the air was a res communis. Therefore, in his Code, while belligerent States were required to abstain from acts of hostility above the territory and territorial waters of neutral States, he declared that the circulation of Belligerent aircraft, military or otherwise, could not be prohibited. Otherwise he was in agreement with Fauchille. Dr Spaight, on the other hand, supported the principle of sovereignty, and in his Code, belligerent aircraft were forbidden to enter the territory,

territorial waters, or atmosphere of a neutral power, (Art. II). In the following Article the obligation was put on neutral States to use due diligence to prevent a violation of this prohibition and to take steps to take possession of belligerent aircraft which did enter, no matter by what means, or under what circumstances, detaining the aircraft until peace. The crew were to be interned in the same manner as land troops in similar circumstances. One exception was allowed to the provisions of these two Articles in favour of aircraft permanently assigned to a battleship so long as it remained in contact therewith. M. Lycklama had suggested that an exception to the express prohibition of entry of neutral territory and atmosphere should be made in respect of neutral ports and territorial waters, but Dr Spaight was of opinion that the anomalies which would arise if this was to be granted would be so great that neutral ports and territorial waters should be regarded as falling into the same category as the territory and the airspace above it. An aircraft entering a neutral port on board a battleship, and being in effect part of that ship would of necessity require to be allowed entry to neutral ports and territorial waters with the ship itself, hence his exception in favour of such aircraft only. Professor Von Bar made no reference to the entry of belligerent aircraft over neutral territory but did, in an indirect sense, prohibit aerial engagements over neutral territory by failing to include it when defining where such engagements would be allowed, (Art. 2). M. le Moyne

had a similar provision (Art 2) but went further, for in Article 3 of his Code he expressly prohibited the aircraft of belligerents from entering the atmosphere and territory of neutral States, and his eighth Article was almost identical with Dr. Spaight's provisions.

Dr Hazeltine did not formulate a Code, but in the course of his Lectures (3) he gave particular attention to the question of neutral atmosphere. He naturally supported the prohibition of flight by belligerent aircraft through neutral atmosphere but he had the same difficulty in settling what was to be the position of neutral ports and territorial water as had M. Lycklama, more especially when the belligerent aircraft entered neutral territorial waters from over the high seas. In the case of neutral ports he was of opinion that "it would seem just to accord the same privileges to the one class of vessels (belligerent air vessels) as to the other vessels (belligerent sea vessels)," that is, if they entered from above the high seas. So also belligerent aircraft should be allowed passage through the airspace above neutral territorial waters. If the aircraft approached the neutral ports or territorial waters through the airspace above land, Dr Hazeltine would have dealt with the craft itself and its crew in the same manner as was proposed by Dr Spaight.

The concluding Declaration in Article 19 of M. Fauchille's Code, that the principles of the Hague Convention relating to the neutral rights and duties in maritime war were generally applicable to aerial war,

(3) Hazeltine - "Law in the Air" - Third Lecture.

caused some difficulty as to whether an aircraft being constructed in neutral territory for the use of a belligerent would fall under the rules applicable to the construction and fitting out of a ship, which a neutral State was bound to prevent, or under the category of "arms, munitions, or anything which could be utilised by an army or fleet" which a neutral State could not itself export, but which it was not bound to prevent its nationals exporting for the use of a belligerent. Dr. Spaight maintained in April 1914 that the principle applicable to vessels should be extended to aircraft (4) but in his Code produced later in that year he stated simply in Article 15, provide for the treatment of

"A neutral power is not bound to prevent the export or transit, on behalf of either belligerent, of aircraft or their parts, materials, accessories, or fittings."

This change of opinion was caused in view of the unnecessary burden which would be cast on a neutral State by adopting his former view. Neither Professor Von Barnor M. le Moyne make reference to this particular matter.

The Second Chapter of M. Fauchille's Code, comprising Articles 2 to 18, dealt with the relations of belligerents inter se. Privateering was forbidden but private aircraft and their crews could be incorporated in the military forces of a belligerent provided they carried a distinctive mark of their character and were under the control of a duly commissioned officer, (Art. 2). Conversion of private aircraft into military aircraft was allowed under the conditions laid down in the Hague Convention relative

(5) Aircraft in War, p. 81.

(4) Aircraft in War, p. 89.

to the conversion of merchant ships, and in the places defined - the territory or territorial waters of the State to which they belonged, the territory occupied by the troops of that State, the open sea, and in the atmosphere, not being above a neutral State. Such aircraft could not be reconverted during the whole period of hostilities, (Art. 3). The Code of M. D'Hooghe simply provided that conversion might be carried out in any part of the atmosphere, such conversion being final, (Art. 3). M. le Moyne and Professor Von Bar were again silent.

Dr Spaight made no provision for M. Fauchille's change over, but did provide for the treatment of civilian airmen engaging in hostilities. The crews of all aircraft engaging in any act of hostilities other than those falling under the definition of military aircraft, were to be brought before the courts as unqualified belligerents and their aircraft might be confiscated, (Art. 2). His reason for this was that a civilian airman constituted a grave danger to the opposing belligerent and should refuse to engage in war like duties "unless their machines are taken over by the military authorities and given the service marks, in fact turned into regular military aircraft; the airmen themselves could be commissioned or enlisted for the time and supplied with uniform." (5)

The Fourth Article of M. Fauchille's Code applied, so far as possible to aerial warfare, certain sections of the Hague Règlement concerning the Laws and Customs command of the force to which the aircraft was attached.

(5) Aircraft in War, p. 51.

of War on Land and the succeeding Article provided that in accordance with the Hague Declarations the discharge from aircraft of projectiles, the sole use of which was the diffusion of asphyxiating or deleterious gases, or of bullets which expand or flatten easily in the human body, would be forbidden. Dr Spaight, on the other hand, merely provided that the various Declarations and Conventions would apply to aerial warfare in so far as not inconsistent with the provisions of his Convention (Art. 3).

The bombardment by aircraft of towns, villages, habitations, and buildings which were not defended was forbidden by M. Fauchille (Art 6) and the Hague Conventions relating to bombardment by land and naval forces was applied to aerial warfare. This matter was pre-eminently important because it affected the whole civilian population. It was well that it should know beforehand its fate in any future war and there was considerable controversy as to its position. However, the general opinion appeared to be that the rules as to naval bombardment, at least, would apply to aircraft, that war was war, and that the civilian population which was sufficiently unfortunate to be near a legitimate object of bombardment would require to suffer the inevitable consequences of its position if an attack took place. Dr Spaight proposed that the Hague Conventions should apply as far as possible, but, as an additional safeguard, aerial bombardment must in all cases be authorised by the Admiral or General in command of the force to which the aircraft was attached, (Art.10).

In the following Article, M. Fauchille defined espionage.

"Aircraft can only be considered suspected of espionage if, acting clandestinely or under false pretences and thus dissimulating their operations, they obtain or seek to obtain, information above the territory or territorial waters of a belligerent, or above territory occupied by his troops, or, in the open sea, above one of his squadrons or ships of war, and, generally in the zone of his operations with the intention of communicating it to the hostile party."

In view of its importance, I have thought it advisable to give the definition in full. The Article further declared that, as a result of the definition, soldiers, not in disguise, on scouting duty and individuals sent in aircraft to carry dispatches and in general to maintain communications were not considered spies, thus re-iterating almost exactly the Brussels Draft Declaration of 1874. The whole Article follows closely the provisions of the Hague Règlement. M. le Moyne had a provision identical with that of Fauchille but he omitted the concluding declaration, (Art 6). Dr. Spaight, however, was dissatisfied with the wording of the Règlement, which he considered unsatisfactory, and his Article was more elaborate. He applied the same test for espionage (Art. 8) but distinguished between private and military aircraft. The crew of private aircraft were guilty of espionage if they obtained or sought to obtain information with a view to communicating it to the hostile party, and military aircraft in the same circumstances would also be guilty of espionage if they attempted to disguise the craft's real character or otherwise acted under false pretences. An individual landing from an aircraft for the purpose of espionage would be dealt with under the rules governing espionage in land

warfare and aircraft concerned in espionage might be confiscated.

Seizure of public and private aircraft and their subsequent treatment was next provided for. According to M. Fauchille, the public aircraft of a belligerent state were liable to seizure and confiscation (Art. 8) while, as regards private aircraft, they could be seized by a belligerent State above his own or the enemy's territory or territorial waters and above the open sea, but must be restored at the Peace without indemnity. (Art. 9) Here again was another highly controversial topic. The provision as to public aircraft, though not appertaining to military service, was peculiar to M. Fauchille's Code. It was on the subject of private aircraft that there was divergence of opinion.

The rule of land warfare was that private property was in general exempt from seizure and destruction except where military necessity demanded this; that of maritime warfare that it was not so exempt. Under which of these rules was the aircraft to fall? M. Fauchille chose a middle course, that private aircraft could be seized but not confiscated, although at an earlier stage he had advocated confiscation also. This was the course directed in Article 53 of the Hague Land Warfare Regulations with regard to aircraft found in invaded territory, although compensation was to be paid for aircraft so seized at the Peace, a provision which was applied to aircraft found in enemy territory, as opposed to above it, by Article 18 of M. Fauchille's Code. M. le Moyne followed Fauchille with regard to aircraft

found in the airspace (Art. 4) but distinguished by between private and public non-military craft. Both could be seized but compensation would be paid in respect of the former. Dr. Spaight approved of return without indemnity except in one particular case which he considered necessary, namely when military necessities demanded their destruction. In that case compensation would be payable, (Art. 4).

Article 9 of M. Fauchille's Code further reserved the right to confiscate private enemy aircraft performing hostile acts or being employed in a military task, a provision followed by Dr Spaight in the sixth Article of his proposed Code.

Professor Von Bar dealt somewhat differently with these matters. His Code was short and not in any way comprehensive. To him it was sufficient to provide that private enemy airships might not be captured in the air unless they entered voluntarily the atmosphere over the enemy's territory or a zone of blockade, or unless it was the case of carriage of contraband, (Art. 3). He followed this up by a mere declaration in Article 6 that private enemy airships were forbidden to enter the atmosphere of the enemy State.

M. Fauchille made provision as to the acquisition of neutral nationality by enemy aircraft, (Art. 10), the exemption from seizure of aircraft charged with scientific or philanthropic missions (Art. 16), and the treatment of the sick and wounded (Art 17), but these are relatively unimportant and generally considered at that time to be outwith the scope of an aerial Code. His eleventh Article, that the character

of an aircraft, enemy or neutral, should be shown by the distinctive mark which it was entitled to carry, met with no opposition and was followed in all the other Codes.

The Articles 12 to 15 were of more importance. The captain and crew of private enemy aircraft or public non-military aircraft were not to be made prisoners of war, but left at liberty, and that, whether they were subjects of the enemy or a neutral State, (Art. 12). That they should be left at liberty did not appeal to Dr Spaight. He thought that a civilian airman was too valuable an asset of a belligerent to be allowed absolute freedom, and suggested that at first, at least, such crews should be entitled to the privileges of prisoners of war, (Art. 9).

The destruction of private enemy aircraft or of public enemy aircraft was only to be permitted under the exceptional circumstances of the aircraft acting as, in fact, military aircraft, or, resisting the legitimate exercise of the right of capture. The destruction could not be carried out until after a special summons had been made, (Art. 13). M. le Moyne had a similar provision to the effect that a captor could destroy aircraft opposing the legitimate exercise of the right of seizure but only after the non-compliance of a previous summons (Art. 4). Dr Spaight once again went further with his proposals. By Article 7 of his proposed Code, private enemy aircraft could be destroyed if they disobeyed a belligerent's orders or his prescribed signal to land. In this he followed M. Fauchille, but in two other cases, namely where such

aircraft engage in hostilities or espionage, or in cases where circumstances are such that a belligerent is forced by imperative military necessity to omit the signal or warning to land which humanity demands, then the aircraft can be destroyed without any previous notice or warning. Such a course he justified on the grounds that if civilian airmen ventured too far they would require to take the risk of being disposed of in the same manner as military crews.(6) There was much to be said for this attitude.

Article 14 made it clear that enemy aircraft descending on the territory of a belligerent could be captured, and the following Article made very full provision for private aircraft of a belligerent being in enemy territory at the outbreak of war, and, aircraft quitting their last port of departure before hostilities and arriving in hostile territory without the knowledge of such hostilities^{to}, being seized only if no days of grace had been allowed for their departure from enemy territory, or, if such days had elapsed without being taken advantage of. Such days of grace were not to be allowed to aircraft, the construction of which showed that they were intended as war aircraft. Public non-military aircraft were to obtain the benefit of any "days of grace" allowed, and private aircraft encountered in the airspace, even although ignorant of hostilities, were to be liable to seizure in the same way as all other private aircraft. This was an attempt to apply maritime principles and pungent criticism was levelled at the Article, not without reason, by Dr Spaight, (7) who

(6) Aircraft in War, p. 78

(7) Aircraft in War, pp. 85-88

who maintained that the provisions were quite useless. ^{that} Certainly it would seem/to deny the days of grace to aircraft intended for war aircraft in itself takes the very foundation away and the whole structure of the Article must collapse, for what aircraft is not suitable for use as a war aircraft?

The relations of neutrals and belligerents were covered by the Third Chapter of M. Fauchille's Code, embracing Articles 19 to 28. Of these, the first has already been considered. Under Article 20 aerial navigation of neutral aircraft was to be prohibited in all parts of the atmosphere dominating the territory of belligerent States, as well as within a radius of 11,000 metres from their frontiers. Of aircraft contravening this prohibition, those guilty of espionage would be treated as ordinary spies while the aircraft of others would be confiscated unless their entry was the result of force majeure. To M. D'Hooghe this Article was, of course, incompatible and in place thereof he provided that the aerial navigation of neutral countries remained free, only aircraft guilty of espionage being confiscated (Art. 22). The corresponding Article of Professor Von Bar was permissive in its terms - a belligerent might forbid neutral ships to enter the atmosphere overlying his territory, (Art.7) while the second part of M. le Moyné's Third Article made the prohibition absolute in all cases. M. Fauchille's provisions did not appeal to Dr. Spaight, especially the provision as to flying within a certain specified radius of the frontiers of a belligerent, and he accordingly proposed that where the frontiers of a

neutral State bordered those of a belligerent, the neutral power must use all means at its disposal to prevent its atmosphere from being used for the purpose of obtaining information on behalf of one belligerent, of the movements, defences, etc., of the other, (Art.16).

M. Fauchille further elaborated his provisions in the Article which followed. Where there was a blockade with an effective area of more than 11,000 metres neutral aircraft might not approach any point in this area; neutral aircraft in a blockaded port might leave it; and the Rules of the Declaration of London (1909) as to blockade would apply in aerial war also. No similar provisions appeared in the other proposed Codes.

The following three Articles all dealt with the matter of contraband. Articles constituting contraband of war might be confiscated on board neutral as well as on enemy aircraft (Art, 22); the rules laid down in the Declaration of London (1909) would be followed in determining what constituted contraband of war (Art.23); and aircraft their distinctive component parts and accessories, articles and materials of the special character of aircraft stores, would fall under the classification of "conditional contraband" confiscable only if destined for the use of the armed forces or Government Department of the enemy (Art.24).

M. D'Hooghe had an identical provision but further proposed specifically that postal correspondence would in the circumstances given be regarded as inviolable. M. le Moyne's only reference was contained

indemnity.

in his Ninth Article which was couched in similar terms to Fauchille's Twenty fourth, and Professor Von Bar's reference was to the effect that the seizure and confiscation of neutral airships and their cargoes as contraband was forbidden unless when they were actually assisting a blockaded coast line or the enemy army or fleet in the theatre of war.

The Declaration of London classed as "conditional contraband" "Balloons and flying machines and their distinctive component parts as well as accessories, articles, and materials distinctively pertaining to aerostation or aviation," but viewed conditional contraband merely as cargo. Dr Spaight had difficulty in making a hard and fast rule covering all aircraft, especially those sent by air. Besides, as has been seen, he provided that private aircraft could only be seized. This being so, no harder rule could be applied to neutral aircraft on the way to become private property. (8) His Article, therefore, proposed that aircraft consigned by a neutral contract: or, by way of the air, to enemy territory could only be seized if designed or fitted for use in war, or, if not so designed or fitted for use in war, then ^{if} it was proved to be destined for the use of the armed forces, or, of a Government Department of the enemy, (Art. 19) Such aircraft could only be destroyed if demanded by imperative military necessity, in which case compensation would be arranged at the peace. Otherwise the seized aircraft must be restored without indemnity.

(8) Aircraft in War, p. 83.

By Article 25, M. Fauchille applied to neutral aircraft the provisions of the Declaration of London relative to unneutral service, and there was to be a presumption of such service, justifying capture, against neutral aircraft circulating above belligerent States. Then by Article 26, neutral aircraft might be destroyed under the same conditions as belligerent aircraft, and by the immediately following Article, Neutral aircraft descending in belligerent territory owing to accident or forced descent might be seized and confiscated in the cases and subject to the conditions specified in his preceding Articles, thus assimilating as to treatment, aircraft in flight and also when forced to descend.

Much the same effect was reached by Dr. Spaight, who, by Article 20, applied to neutral aircraft the provisions operative with regard to belligerent aircraft in corresponding circumstances, that is, the aircraft themselves would be confiscated, fired upon, endangered, or destroyed in flight in the same circumstances as would private enemy craft, and the crew treated in the same way as those of other than enemy military aircraft engaging in acts of hostilities or being guilty of espionage. M. D'Hooghe followed Fauchille except in so far as he added an Article providing for "visit", of private neutral aircraft, a provision not made by the others on account of the serious difficulties and complications which would arise by endeavouring to enforce it, and Professor Von Bar only proposed that neutral airships must not be fired upon without previous warning, and must not be fired upon if compelled by accident to land.

M. Fauchille concluded his proposed rules on the relations of belligerents and neutrals by the provision that, as regards aircraft belonging to the latter in the territories of belligerents, the subjects of neutral States would be on the same footing as those of belligerent States, (Art. 28)

Finally, his Code was completed by a Chapter, consisting of but one Article, on Aerial Prizes.

The adjudication of such prizes was to be subject to the same rules as maritime prizes; unless the seizure of an aircraft or its cargo could be justified, there would be a claim for damages, if it was not upheld by the Courts, or was not maintained; and, where the aircraft was destroyed, unless in the circumstances where such a course was justified, the captor would be bound to indemnify the persons interested, whether the seizure was valid or not. While these were far-seeing, and, in the light of subsequent events, necessary provisions, they were not considered of sufficient importance at the time to warrant inclusion in the other proposed Codes, except that of Professor Von Bar who applied the maritime rules in the exceptional cases mentioned in his Code, where seizure and confiscation of neutral airships and their cargoes as contraband was permitted.

It will thus be evident that, even before 1914, the revision of the rules of warfare occasioned by the coming of aircraft had been the subject of a fairly exhaustive study by certain of the jurists whose solutions of the problem had been worked out in considerable detail. The early recognition of

the necessity for a unified Code is significant, and it is one of the curious variances of history, that, while this was so, the law in times of peace obtained its Code not many years later, while the rules in times of war are, perhaps further than ever before from being the subject of an agreed International Code.

Chapter 5. The Beginnings of International, National, and Municipal Legislation.

I have so far confined my consideration of aviation law to an enumeration of the problems to which flight gave rise and the opinions of the individual jurists and legal bodies thereon, but it must not be assumed that before 1914 no actual attempts had been made to legislate for the use of aircraft. On the contrary, several years before the outbreak of War, States had commenced to enact laws to regulate some of the more important matters concerning aircraft, and municipalities, also, had begun to make regulations. Further, there had been international agreement on a fair number of questions as early as 1910. Some of these have already been referred to, but the purpose of the present chapter is to summarise, in chronological order some of the more important legislation, from which it will be more readily seen how far the law in relation to aircraft had left the realms of mere theory and become an actual and accomplished fact.

1910

The International Aeronautic Federation must be regarded as the first air organisation. It began its existence in 1905 and from that date exercised considerable authority on aerial sporting events and competitions. It was largely on its recommendation and by the efforts of the Aero Club of France that a Conference was called in Paris in May 1910 to consider the question of framing an International Code of Law for the regulation of Aerial Navigation. It was on the vexed question of sovereignty of the

airspace that the fate of the Code was decided, for, as agreement on this point was not possible, no Code could be completed. Nevertheless, a comparatively complete draft Code was formulated and its clauses are important as indicating the extent of International Agreement in 1910.

At the outset the word "aircraft", which had hitherto been used in a general sense, was given a more precise definition. The term was to be regarded as comprising "Free Balloons, airships, and flying machines" (Art. 1).

Next, agreement was attained on the matter of nationality and registration of aircraft but only after a considerable conflict of opinion, and it was of a vague and unsatisfactory nature. It was left to each country to determine nationality of an aircraft on the basis, either of the nationality of its owner, or, on his domicile in its territory. It was further provided that a State would require that the owner, if a national, should be domiciled in its territory, and aircraft owned by foreigners domiciled in its territory could also be placed on its national register. If the aircraft belonged to a corporate society or joint stock company, the company's head office must be situated in the territory of the State on whose register it appeared. (Art. 3) The State which conferred nationality on an aircraft was required to enter it on a Register, (Art 6), and a Certificate of Nationality was to be issued.(Art 8). It was also agreed that every aircraft must be provided with a Certificate of Navigability (Art.12) and that the pilot and chief mechanic must be licensed (Art 14). Such Certificates and Licences

when issued by one State were to be recognised by the other contracting States, (Art. 18).

The Conference having proceeded so far, now endeavoured to settle the "admission of aerial navigation within the limits of, or above, the territory of a foreign State" but, further than this heading, agreement could not be reached. Notwithstanding, it is interesting to see that despite a failure to obtain unanimity on the matter of sovereignty, it was possible to agree that "forbidden zones" could be created and a provision was made for landing, by a pilot finding himself over such a zone. (Arts 21-24). The regulations to be observed on departure, on landing, and during

flight contained little controversial matter, covering as they did the documents required to be carried, the rules of the air, which had a close resemblance to the maritime rules, and the notification of wrecks.

Provision was made for Customs formalities and transportation, the latter being almost entirely confined to restricting transportation of passengers and goods in the interests of each contracting State.

Public aircraft were specially provided for. They were classified as (a) Public aircraft, defined as "aircraft employed in the service of a contracting State and placed under the orders of a duly commissioned official of that State" (Art 40), (b) military aircraft, which were "public aircraft in military service when they are under the orders of a commander in uniform and have on board a certificate proving their military character", (Art 41); and (c) police aircraft, being

(1) R.J.L.A., 1910, p. 346.

(2) I. Geo V. Cap. 4.

"Public aircraft employed in the service of the police, especially that of the departments of public safety, public health or customs," (Art.47). Such aircraft were placed in a special category, and, while the Conference could not decide the rights of private aircraft of one State in the airspace above the territory of another contracting State, the States represented were in no doubt at all as to the rights of military aircraft in such airspace. Article 44 was explicit in its terms.

"The departure or landing of the military aircraft of a contracting State in the territory of another State will only be allowed with the latter's authorisation. Moreover, each Contracting State is free to forbid or to regulate as its interests demand, the passage of the military aircraft of the other contracting States over its territory,"

The forced landing of military aircraft was duly safeguarded.

Lastly, among the final provisions, it was proposed that the Convention was not to restrict the freedom of action of belligerents or affect the rights and duties of neutrals, (Art. 49).

In 1910, also, there must be noted the Prussian Ordinance under which a Pilot had to be licensed before undertaking flights over places where the general public might be endangered. (1)

1911. The succeeding year, 1911, brought considerable advancement in the field of aviation law and legislation of no little importance was enacted. That year saw the first legislation in Great Britain, the Aerial Navigation Act, 1911, (2) or, to give it its long title, "An Act to

(1) R.J.L.A., 1910, p. 346.

(2) I. Geo V. Cap. 4.

"provide for the protection of the public against the dangers arising from the navigation of Aircraft."

It enacted that "a Secretary of State may, for the purpose of protecting the public from danger, from time to time, by Order, prohibit the navigation of aircraft over such areas as may be prescribed in the Order....." The Order could apply to all aircraft generally or to certain classes only and the prohibition could be either absolute or partial. The person contravening the Order was to be guilty of an offence and could be imprisoned in the first instance.

During this year, in America, are to be found further rules concerning the licensing of pilots, both in the Act drafted by the Aero Club of Pennsylvania (3) and also in a draft Connecticut Act (4). Further, a French Presidential Décret was issued on 21st November, 1911, based largely on the 1910 Draft Convention. Detailed Rules of the Air were given, and provision made for customs formalities and the like, but perhaps of greatest moment was the statement, "La circulation en France des aéronefs militaires étrangers est interdite."

In 1911 a Draft Bill was prepared in Great Britain for the Home Office. Although not adopted either by that Department or by the Government, the draft Bill marked a very definite stage in aeronautical legis-

lation. Its preamble was illuminating. "Whereas the sovereignty and rightful jurisdiction of His Majesty extends, and has always extended over the air superincumbent on all parts of His Majesty's Dominions, and the territorial waters adjacent thereto."

This left no doubt as to the official British

(3) R.J.L.A., 1911, p. 247.

(4) do. do.

attitude on the question, and, having laid down this principle, the Secretary of State was empowered by Order, to regulate aerial navigation over the British Islands and territorial waters adjacent thereto, and, in particular, to create prohibited areas and corridors of entry, and to prohibit, restrict, or regulate the carriage of various persons and goods. Furthermore, the Act proposed to settle immediately the equally difficult question of the cujus est solum maxim and its application, and purposed enacting as follows: -

"Sect. 12(1) - The flight of an aircraft over any land in the British Islands shall not in itself be deemed to be trespass, but nothing in this provision shall affect the rights and remedies of any person in respect of any injury to property or person caused by an aircraft or by any person carried therein and any injury caused by the assembly of persons upon the landing of an aircraft shall be deemed to be the natural and probable consequence of such landing."

It was further provided that the aircraft itself could be seized and detained to pay the damages awarded and costs incidental to the proceedings. The section was wide in its terms and open to serious criticism. For one thing, it took outwith the scope of an action for trespass and nuisance all flight, no matter at what height and under what circumstances, and could conceivably have made the position of the landowner intolerable. Nevertheless it was a step in the right direction and would have avoided any further discussion as to the application of the maxim. The case of *Scott's Trustees v. Moss* (5) must have been in the mind of the draughtsman when he inserted the concluding words of the subsection.

(5) supra: 1889, 17 R. 32.

It was to the Board of Trade that the control of aviation was assigned. While the Secretary of State was empowered, by Order, to make such provision as might appear best calculated to prevent damage and nuisance caused by aircraft, this end was also obtained by authorising the Board of Trade to make provision for the certification of the airworthiness of the aircraft themselves and of the competency of the officers. The Board would further make the necessary regulations to prevent collisions in the air. These were to be known as "collision regulations". Infringement of such regulations gave rise to some divergence of opinion and two alternative solutions were given. In the first, where the infringement was caused by the wilful default of the "owner or navigator" of the aircraft, such "owner or navigator" would be guilty of a misdemeanour; and where damage to property was caused by the non-observance of such regulations, the damage was to be deemed to have been occasioned by the wilful default of the person in charge of the aircraft, unless it could be proved satisfactorily that the circumstances made such departure from the regulations necessary. In the second, these stringent provisions were relaxed. The "person in charge of the aircraft at the time" was put in as a third alternative to the "owner or navigator"; and, as regards damage to property, the onus now lay with the navigator, and all wilful default was presumed to be his, but it was provided that "if the navigator proves to the satisfaction of the court that he issued proper orders for the observance, and used due diligence to enforce, the observance of

the collision regulations, and that the whole responsibility for the infringement in question rested with some other person, the navigator shall be exempt from any punishment under this provision."

With regard to wreck and salvage, any person finding a lost or wrecked aircraft was to report it to the police or other proper authority and the provisions of the 1910 Paris Convention were followed as to payment of salvage.

British nationality would be given to an aircraft only if it was owned by persons having British Nationality as laid down in the Act, and only such British aircraft could be registered in the manner prescribed by the Board of Trade.

Finally, an attempt was made to lay down some rules on the subject of "jurisdiction". In the first place, any offence under the Act was, for this purpose, to be deemed to have been committed "In the place in or over which the same was actually committed or in any place in which the defender may be." In the second place, where any person being a British subject was charged with having committed any offence on board any British aircraft in the air, over the high seas, or over any foreign country, or, on board any foreign aircraft to which he does not belong, or, not being a British subject, was charged with having committed any offence on board any British aircraft in the air over the high seas, and that person was found within the jurisdiction of any court in His Majesty's Dominions, which would have had cognisance of the offence if it had been committed on board a British aircraft within the limits of its jurisdiction, that court should have

flying over places where there was danger of fire, or jurisdiction to try the offence as if it had been so committed. In the third place, where the offence was committed in the air above British territory or territorial waters it should be deemed to have been committed either in the place where it was actually

1912. The year 1912 is important, marking as it does, the first attempt at municipal regulations, when Paris Prefect of Police made provisions dealing with flight over that city by aeroplanes and dirigible and free balloons. Landing within the city of Paris or the Communes of the Seine Department was forbidden and the aircraft referred to must fly at such a height as would enable them to land free of buildings. Should there be a forced landing the aircraft was to be dismantled and removed to the nearest starting ground outwith the area. No ballast other than fine sand, Competence issued by the Airship League. No provision was made for the issue generally of airworthiness certificates in respect of the aircraft themselves

In Germany, detailed Regulations were issued under which the German Airship League was officially recognised and became the organ through which licences were issued. The Pilots of dirigible and non-dirigible airships were required to possess Certificates of Competence issued by the Airship League. No provision was made for the issue generally of airworthiness

In July, Russia established Forbidden Zones, being the first country actually to do so although but, if passengers were to be carried, experts must have pronounced the craft and its fittings suitable for the purpose, and, during the ascent, it was necessary to have an official of a recognised airship society or local police representative on board. The safety of persons on the subjacent territory was looked to in the provisions that persons not in possession of a Certificate of Competence could only fly at specially selected places, or at places where

1913. During 1913, there was further important legislation. In Great Britain, an Act (7) was passed was unrestricted to competent airmen outside of inhabited places although the police could make regulations, and they were warned against flying over large towns. They were altogether prohibited from

(6) H.B.I., 1913, Documents, p. 73.
(7) 2 & 3 Geo.V. cap. 22.

flying over places where there was danger of fire, or masses of telegraph and telephone wires, as well as over fortresses, and within ten kilometres of such fortresses. Persons infringing this latter regulation were to be suspected of espionage.

1912.

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In July, Russia established Forbidden Zones, being the first country actually to do so although the British Act of the previous year had opened the door for such areas being defined. At the end of the year Austria (6) approved of legislation dealing with measures of the police against attempts upon the public or private security by aerial locomotion vehicles, and, in the following month, the prohibited areas, which the Ordonnance foreshadowed, were announced.

1913

During 1913, there was further important legislation. In Great Britain, an Act (7) was passed to amend that of 1911. The powers of the Secretary

(6) E.D.I., 1913, Documents, p. 73.

(7) 2 & 3 Geo.V. cap. 22.

of State with regard to prohibited areas was extended in two respects. In the first place, to the purposes for which such areas could be prescribed, was added the defence or safety of the realm, and, in the second place, the possible extent of such areas was enlarged to embrace the coast line of the United Kingdom and the territorial waters adjacent thereto. Further, the Secretary could now prescribe "the areas within which aircraft coming from any place outside the United Kingdom are to land and the other conditions to be complied with by such aircraft." Power was also given to compel aircraft flying over any forbidden area to land after it had been duly signalled to do so. The Act was followed by two Statutory Rules and Orders in March and September respectively. The former defined the prohibited areas and corridors of entry, specified compulsory landing grounds, and detailed the procedure to be observed by visiting aircraft, while the latter prohibited the flight of aircraft over London within a radius of four miles of Charing Cross.

In France, two further Décrets (8) were issued. The first was short and dealt with the treatment of aircraft in times of national emergency. There was to be an absolute prohibition of flight in the event of a total or partial mobilisation, and the order for such mobilisation would in itself have the effect of bringing this prohibition into force. The second was longer, and re-iterated to a great extent that of two years previous, with the changes and additions which the experience gained during that time

(8) R.J.L.A., 1914, pp. 12-19.

demanded. The Service des Mines was the Department charged with the issue of Certificates of Navigability and aircraft could only be registered on production of such a Certificate. It was provided that once an aircraft had been examined and a Certificate issued, aircraft of a similar type would be granted Certificates of Navigability without examination if it was certified that they were exactly the same as that in respect of which the first Certificate was issued. The letter "F" was to be painted on all aircraft owned by foreigners domiciled in France, as well as by Frenchmen. Lastly, military aircraft were classified in the same manner as in the draft Convention framed by the Paris Conference in 1910. They were required to be under the orders of a commandant wearing uniform and must carry a certificate establishing their military character.

Legislation was drafted in Holland (9), peculiar in that it provided for the licensing of pilots but not of the aircraft itself, and Regulations appeared in Serbia during February and March (10). These latter Regulations were wonderfully complete and exhaustive and were almost severe in their attempts to provide for safety. The Ministers of the Interior and of War were entrusted with the task of controlling aviation. The former would grant Certificates of Airworthiness in respect of the machines and the latter would issue the necessary Licences to pilots,

(9) R.J.L.A., 1914, p. 95.

(10) R.J.L.A., 1914, p. 158.

but, still further, was it provided that there should be no flight during stormy weather or at night. The flight of foreign military aircraft was prohibited both in peace and in war, and all other aircraft were forbidden to fly over Serbian territory during mobilisation or war unless permitted to do so by authority of both Ministers. In addition, foreign aircraft could only enter Serbian territory at the ^{at} places and ~~the~~ times fixed by the customs authorities and were obliged to land immediately. They could only continue their flight along the routes prescribed by the Police Authorities.

In America, the State of Massachusetts (11) produced an Act intended primarily to provide for the public safety, ^{which} and is important only in so far as it is an example of the type of legislation which was prevalent in the various American States and which was enacted hurriedly and by persons who had little knowledge of aeronautics. To the Highway Commission of Massachusetts was given the duty of licensing aircraft and pilots after examination. Aircraft were to be given a registered number which was to be painted on them so as to be visible from below. Rules of the air were given and certain restrictions were put on flight. For instance, aircraft were prohibited from flying over an assembly of one hundred persons or more; they could only fly over cities at a height of over three thousand feet and over towns and villages at heights over five hundred and a thousand feet according to the

(11) R.J.L.A. 1913, p. 216.

number of the inhabitants; and could only fly over military authority was to be advised, when the buildings, persons, or animals at a height conducive to safety. An aviator was liable for injuries resulting from his flying unless he could demonstrate that he had taken every possible precaution to prevent injury. There was to be no landing on public highways, aircraft. The entry of other aircraft was admitted, public parks, or other public grounds except in cases of emergency. As an example of the careless manner in which this legislation was drafted there may be quoted the case of the first prospective aviator who applied for a Licence under the Act. He was informed that, as the Act made no provision for constituting the necessary examining Board, a Licence could not be issued. He flew without one, crashed, and was charged with flying without a Licence contrary to the terms of the Act. To the court which tried him must go the credit of excusing him on hearing his explanation.

1914. Thus far had aviation law developed when the year 1914 dawned. The European States were nervously regarding every movement of their neighbours. War was imminent and aircraft were now to be used to an extent, and in a manner in which the early jurists in the wildest flights of their imagination had never conceived, but before progressing further a short recapitulation is perhaps desirable.

The year 1913 was, however, productive of yet another type of legislation, the Franco-German Accord (12) which marked the first definite stage of International Agreement in aviation law. It provided for the entry of French aircraft into Germany and of German aircraft into France on conditions of reciprocity. The main points were that the military aircraft of one country could only circulate over the territory of the other, or land, on invitation. Entry might be allowed in cases of necessity, but in that case a distress signal was to be made and a landing effected. On this being done the nearest aircraft and their crews with the formalities to be

(12) R.F.I., 1913, pp. 697 et seq.

regulations were wholly matters to be decided by the

internal legislation of each particular State, its military authority was to be advised, when the development had been influenced, on the one hand, by the alleged necessity would be enquired into and action taken in accordance with the result. The Governments of the two countries were to advise one another as to the distinguishing marks borne by their respective aircraft. The entry of other aircraft was admitted, except over prohibited areas, on condition that the aircraft was licensed and carried the proper identification marks, and that the pilot held a certificate of proficiency and carried papers certifying his nationality, and a passport. The entry of aircraft not complying with these requirements would only be permitted in case of necessity, in which case also they must give signals of distress, and land, in this case, however, notifying the nearest civil authority of the position.

1914. Thus far had aviation law developed when the year 1914 dawned. The European States were nervously regarding every movement of their neighbours. War was imminent and aircraft were now to be used to an extent, and in a manner in which the early jurists in the wildest flights of their imagination had never conceived, but before progressing further a short recapitulation is perhaps desirable.

Certain characteristics had so far marked the first stages of the development of the law. Apart from regulations, such as Customs regulations, having for their main purpose the compliance by aircraft and their crews with the formalities to be observed by other forms of transport, and which regulations were wholly matters to be decided by the

internal legislation of each particular State, its development had been influenced, on the one hand, by the danger to the States themselves occasioned by the use of aircraft as weapons of war, and, on the other, by the danger to their inhabitants occasioned by the normal incidents of flight. In this latter respect all the actual legislation had tended to secure safety by certification of the machine and its crew, or by one or other of these means, ^{cf?} (of the Serbian Regulations.) There was, no doubt, some divergence of opinion on the part of the individual jurists, but international agreement was not unattainable. So also agreement had been reached on the question of nationality of the craft, the papers it would require to carry, and the distinguishing marks it would need to have. Questions of jurisdiction were not, perhaps, so easily settled, although in many instances the rules of private international law already in existence could be invoked. The other outstanding difficulties could be met by legislation along the lines of the draft British Bill of 1911. ~~Decret prohibited flight over France~~ As regards the first of the two dangers - that of the States themselves by the use of aircraft as a weapon of war - international agreement seemed still impossible. And yet to what did the difference of opinion amount? Much had been said of ownership of the airspace, of the air as a res communis, and of the air as entirely free, but all legislation so far enacted had one significant feature. Whatever might be the position of private aircraft and other public aircraft, the military aircraft of one State were

invariably prevented from entering the airspace of another. Surely, in itself, an admission of sovereignty of some kind. Again, the various enactments disclosed an almost universally recognised right to each State to prescribe prohibited areas. So too, Customs formalities demanded at least fixed landing grounds, and even fixed areas of the frontiers or coast lines over which aircraft coming from abroad must enter. It might, therefore, be said that all freedom of the air amounted to was the right of a small class of aircraft, private aircraft, to pass over the territory of other States without landing. Yet this had so far proved the stumbling block.

Great Britain, although imposing severe restrictions on the entry and landing of foreign aircraft, amounting indeed, in the eyes of her critics at home and abroad, to prohibitions, was not alone in this respect, and the time was now at hand when all European nations were to follow suit. On 31st July, 1914, a French Décret prohibited flight over French territory and territorial waters. Two days later by a Home Office Order, the flight of civil aircraft over the United Kingdom was prohibited, except within a radius of three miles of a recognised aerodrome. Almost simultaneously, the frontiers of the remaining States were closed, and aircraft, and the law in relation thereto had entered a new era in their development.

Chapter II. The History of the Great War.

The hopes and fears of those who had foreseen the
 future possibilities open to a belligerent by the use
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PART II.

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 Yet out of the turmoil there were certain existing
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To begin with, the principle of sovereignty came to
 be regarded from a new point of view and not merely
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 territory was as good as sovereign. It could
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This recognition of sovereign rights was as
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 use of the atmosphere superincumbent on neutral States.

Chapter VI The Effects of the Great War.

The hopes and fears of those who had foreseen the immense possibilities open to a belligerent by the use of aircraft as a weapon of war were early fulfilled. Indeed, the German Declaration of War - the letter handed by the German Ambassador to the French Foreign Minister on 3rd August, 1914, - gave as the reasons for declaring War the flagrantly hostile acts committed on German territory by French military aviators, their violation of Belgian neutrality, their attempt to destroy buildings near Wesel, and the throwing of bombs by them near Nuremberg.

Thus aircraft were used in the opening days of that long conflict and their continued use had several important effects on the proposed Rules of Aerial Warfare. The Declaration of War was the signal for a general disregard of even the Hague Declarations, as it was for the whole International Rules of Warfare. Yet out of the turmoil there did emerge certain guiding factors for any future aerial war Code which might be agreed upon.

To begin with, the question of sovereignty came to be regarded from a severely practical and not merely theoretical standpoint and the case for each State having complete sovereignty in the airspace above its territory usque ad coelum was overwhelming. It could not possibly have been otherwise.

This recognition of sovereign rights usque ad coelum had an important bearing on the question of the use of the atmosphere superincumbent on neutral States.

Each case of the entry of belligerent aircraft over neutral territory was at once the cause of a protest being addressed to the belligerent concerned, and, as in most cases the entry was unintentional, an apology and an undertaking to make good any damage occasioned was accepted. Even in such cases, however, Holland reserved the right to open fire on belligerent aircraft without previous warning as it did when the German airship L. 19. was compelled by force majeure to enter the airspace above its territory. There was one curious incident in this connection when British aeroplanes flew over Swiss territory. The British Government, while expressing regret, added that that was not in itself to be interpreted as a recognition by the British Government, one of the most ardent protagonists of sovereignty, of the existence of a sovereignty of the air. It is difficult to reconcile this with the avowed British attitude towards sovereignty which had been the cause of the Paris Conference of 1910 failing to reach agreement. There do not appear to have been many cases of neutral aircraft penetrating belligerent atmosphere but in at least one case such neutral aircraft were heavily fired on.

The pious resolutions regarding the prohibition of various projectiles and the use of asphyxiating or deleterious gases - the Declaration of St. Petersburg and the Hague Declarations - were flagrantly broken both in land and aerial warfare, and the bombardment of the civilian population was

carried out by Germany without regard to any existing Rules. The Allied Powers, however, followed the Naval Rule that naval and military objectives situate in towns were legitimate targets thus abandoning the Land Warfare Rule which made bombardment of a town conditional on its being undefended.

While the law regulating the use of aircraft in warfare was this^u profoundly affected by the advent of the Great War, its effect did not end there, and the development of the law in times of peace was also considerably influenced. In fact it would be difficult to over-estimate the impression made by the War on the technical development of aircraft, a development without parallel in history. In the words of a recent Government Report,

"the ensuing struggle for military supremacy resulted in the forced growth and abnormal development of aircraft" (1)

so much so, that in the short space of four years, what had, at the outset, been a mere weapon of war became an all important means of transport and communication with almost unlimited possibilities.

A corresponding growth of aviation law was the inevitable result of this rapid development in the uses to which flying machines could be put. Although it had occupied the minds of the various legislatures some little time before it was not until the peace that this took effect. If the development of the law is to be seen in its true perspective, however, and its significance fully understood, an attempt must first be made to set forth the exact nature of the development of aviation itself.

(1) Cmd. 4654 (1934), p. 22.

This was twofold, technical development and control. The former was all important for it meant that the aircraft became more reliable and could, therefore, be used for an ever increasing number of purposes. But more than that, the direct effect of war was to increase the supply of aircraft and personnel until at the peace the belligerent countries were left in possession of a large nucleus of this new means of transport and communication. The exact import of this is perhaps best seen by considering for a moment the position in the United States of America. In November 1918, America was in possession of an overwhelming number of aircraft, the primary purpose of which had been to strike the decisive blow in the War. With the Armistice their use in this direction was no longer required. Instead, they were used in the formation of the American air mail which has since become world famous. This is a pregnant example of the effect of numerical air strength at the conclusion of the World War, and, as the position was the same in other countries, its repercussion on the law must be only too obvious.

But to digress for a moment to the matter of the control of aviation. Here the effect of the period under review is also clearly seen. In August 1914 the aircraft was the adjunct of the existing fighting services. By 1919 it was a third fighting service, equal in importance to the navy and to the army, and, in Great Britain, under the supervision of a Principal Secretary of State. This evolution is not

without interest for in it is found the reason for aviation law continuing to be sponsored by what is principally a War Department. The form it took was the result of the conflict between the fighting services themselves desiring the continuance of the status quo, and the growing demand of a terrorised public for complete reorganisation. The first step in compromise was taken in February 1916 when a Committee was set up under Lord Derby to ensure that the manufacture, supply and distribution of material required was in accordance with the policy of aerial warfare laid down by the Government. This experiment failed and in May of the same year the Derby Committee was superseded by the Curzon Air Board. This Board existed solely as a co-ordinating body between the two services. Acting on the Report which it presented, power was obtained to constitute a new Board with executive powers, and, in February 1917, this Board came into existence under the Presidency of Viscount Cowdray. The growing menace from the air increased the public demand for a more drastic reorganisation, and, in November 1917, the Air Force (Constitution) Act was laid before Parliament, and became law that same month. Under it the Air Council was constituted and its President was declared to be one of the Principal Secretaries of State with the title of Secretary of State for the Royal Air Force. Under the Air Navigation Act of 1919 the control of civil aviation was entrusted to this Secretary of State who then became the Secretary of State for Air. Thus it was that the development of aviation started in war, continued under the supervision of a

Secretary charged mainly with the control of a fighting service, although admittedly under a special branch of his Department, and the development of the law, national and international, continued to be influenced in a similar manner.

Nevertheless, one must revert to the exceptional technical development and numerical increase of aircraft to find the main reason for the legal development. While there had been a Pan American Aeronautical Conference in 1916, it was not until May 1917 that a Committee was set up in Great Britain to consider and report to the Air Board with regard to

"(1) The steps which should be taken with a view to the development and regulation after the War of aviation for civil and commercial purposes from a domestic, and imperial, and an international standpoint; and
 "(2) The extent to which it will be possible to utilise for the above purpose the trained personnel and the aircraft which the conclusion of peace may leave surplus to the requirements of the Naval and Military Air Services of the United Kingdom and Overseas Dominions."

This was known as the Civil Aerial Transport Committee and its Report was presented in 1918 after the Air Council had been constituted. The first Special Committee appointed was entrusted with the enquiry into the legal position, and, in particular, it was to advise as to policy and necessary legis-

lation with special reference to national sovereignty and international questions, the necessary amendments of the common and statute law as to the airspace covering private property, and the principles of liability for damages caused by aircraft. In effect, it was to consider the very questions which had engaged the attention of the

early jurists. Convention of that year. The Sub-Committee made an exhaustive enquiry having before it the Paris Draft Convention of 1910 with the observations made thereon by the Sub-Committee on Imperial Defence, and the Draft Home Office Bill of 1911. It confined itself to an examination of these documents and made suggestions for their improvement and amendment. The Reports of the Sub-Committee are of great interest and have proved of inestimable value for they were freely used when the Convention of 1919 was being drafted. They contain a mass of valuable information and the legal questions receive greatest attention.

While I do not intend to examine these Reports in detail, there are some points which I think require special consideration. Of these, the attention given to the question of sovereignty of the air is of paramount importance, for, in the words of the Report (2)

"this question of sovereignty is one upon which agreement between the contracting Powers is vital in the future interests of civil aerial transport."

It must further be borne in mind that when the Committee was appointed the principle of sovereignty had already been accepted. Rolland, writing in 1916, was able to state (3)

"There is now a veritable custom.....the prohibition issued seems to have been considered quite natural practically everywhere.....All the elements of a custom are here combined; practice, a doctrinal solution in agreement with it, public opinion to support it".

As was seen, the Articles relating to this matter could not be settled in 1910 and did not appear in

(2) Cmd. 9218 (1918) p. 5.

(3) R.D.I. 1916, p. 577.

the Paris Draft Convention of that year. The Sub-Committee of the Committee on Imperial Defence had in 1913 suggested the insertion of five articles by which each contracting State was to permit the aircraft of other States to fly within the limits of and above its territory subject to certain restrictions, and, in particular, the right to forbid the navigation of foreign aircraft in so far as this was deemed necessary to guarantee its own security or that of the lives and property of its inhabitants. In general, restrictions were to be applied without inequality to the aircraft of every other contracting State. In cases of accident, entry or landing which might otherwise have been forbidden, were not to be refused.

These articles were, in principle, accepted by the Special Committee of the Civil Aerial Transport Committee but in case one State might use its powers of restriction more severely than others - in which event it could not on that account be differentiated against by others - the Special Committee recommended that provision should be made whereby any contracting State might refuse to accord to any other contracting State any facilities which the latter did not itself accord under its regulations.

With regard to the Preamble to the Draft Bill of 1911 (4) it was suggested that it should be altered to read

"Whereas the full and absolute sovereignty of His Majesty extends....."

the words "full and absolute" being additional.

While this was all that actually appeared by way of proposed legislation, the members of the Committees were not slow to give expression to very definite views. It is unfortunate that since much of the information laid before the Committees was of a confidential and secret nature the Reports could not be presented to the public in their original and complete form, for, as a result, much valuable information on this very question of sovereignty was not made public. Notwithstanding this, there is much to be gleaned from them.

Throughout, the conflict between the two schools of thought, those asserting sovereignty usque ad coelum and those asserting it up to a prescribed limit, can be discerned, and the Committee might easily have favoured the latter view, had it not been for the fact that the worst war in history was being waged when it was considering its Report. It was the military argument which finally prevailed, but not before the Committee had reported that:-

"from the purely business point of view of the prospects of civil aerial transport in times of peace, the latter view (sovereignty up to a prescribed limit) has much to recommend it." (5)

However, the balance weighed in favour of sovereignty usque ad coelum and the arguments in favour of that principle are so convincing as to be unanswerable.

"To give to foreign aircraft, as a matter of acknowledge: international law, the right to fly at will over the territory of the State would be to give them undesirable opportunities for espionage, and generally to limit the elementary right of a State to take each and every measure which it considers necessary for self preservation. In time of war, moreover, the doctrine of the "freedom of the air" above a certain altitude would give rise to most embarrassing questions

"neutral States.....The case of the upper air
 "presents no true analogy to the case of the high
 "seas outside the limits of territorial waters,"

and again, in effect a mere declaration that flight

"the experience of the present war has merely served
 "to increase the force of these considerations, and we
 "agree with the Special Committee that the doctrine
 "of State sovereignty in the airspace usque ad coelum
 "on which this country acted before the War and on
 "which, along with neutral countries, it still acts,
 "is sound, and should be adopted as the basis alike
 "of international agreement and of municipal legisla-
 "tion." (6)

The air space above territorial waters, the Committee
 agreed, should be regarded from the same point of
 view, as that above the territory of the State itself.

Yet the Report was not altogether unanimous,
 and one finds Mr Frank Pick, who subscribes as on
 minority Report, writing, as he declares "in the
 spirit of hope" and deprecating any commitments to an
 avowed policy of sovereignty usque ad coelum. His
 argument is twofold. In the first place the policy
 to be adopted must be one upon which the nations as a
 whole are agreed and the code of laws so decided must
 be applied only, and then only if a breach of flying

"openly and equally among all nations upon some
 "mutually enforceable sanction" (7)

In the second place, Great Britain's interest as a
 Great Power and as a commercial and industrial people
 lies towards an international settlement of
 sovereignty. But his arguments are not convincing,
 and, even in the new order of things which he
 visualised - and which the events of a few years have
 shewn to stand on a very insecure foundation - are
 not sufficient to rise above the military reasons
 which caused the majority of his colleagues to favour
 a policy of sovereignty usque ad coelum.

(6) Comd. 9218, p. 5.

(7) Ibid. p. 16.

The provisions of the Draft Bill of 1911 regarding the rights of private landowners were very narrow, being in effect a mere declaration that flight itself was not to be regarded as a trespass, while saving the existing remedies open to an injured party for damage actually suffered. (8) The inadequacy of such a provision was recognised and the Special Committee recommended that the Bill should provide that no action for trespass should lie except for material damage to persons or property, whether caused by flight, ascent, or landing, or the fall of objects from aircraft; that this action of trespass should include one for injury caused by the assembly of persons on the landing or ascent of aircraft elsewhere than at authorised aerodromes or landing places; that the obligation of the aviator in an action for trespass should be absolute, negligence not being a necessary element in his liability and "unavoidable accident" no defence; and that an action for nuisance should lie for damages only, and then only if a breach of flying regulations is proved, as well as actual nuisance.

This was a considerable advance but it was open to criticism. In the first place, it took from the landowner any right of property which he might have in the airspace usque ad coelum. In fact, unless he could prove actual damage to person or property, aircraft could fly at will above his land. Even his action for nuisance was barred unless he could prove a breach of flying regulations. With such a provision flight would have been as disastrous for the landowner

(8) Ante p. 96.

as would the maintenance of his right of ownership usque ad coelum have been to the aviator.

The Committee was certainly not unanimous on the matter, and, while the majority appreciated that a nuisance might be caused by regular low-flying, they were not in a position to make any recommendation as to the limitations of altitude to be prescribed by regulation. The very mention of a limitation of altitude was offensive to Mr G. Holt Thomas who, in a minority report, suggested that regulations should only be made to meet the circumstances as they arose. On the other hand, Mr W. Joynson Hicks, as he then was, appreciated the hardship which would be occasioned to a landowner by unlimited flight at any height. In his reservation to the Report, he remarks:-

"though the whole doctrine of the right of the landowner to property in the air to an indefinite height must be curtailed, still, I am clearly of the opinion that the public will demand, and rightly, a limit above which (except under stress of weather) aviators must fly above private property, and that any persistent flying under this height should be preventable by injunction." (9)

The majority proposal was certainly a reversal of the right of the landowner to the very opposite extreme, and is greatly to be wondered at in view of the expressed opinion of the General Committee that the right of the landowner in the airspace above his lands had generally been recognised in English Law to extend "usque ad coelum". (10)

Incidentally, this tends to confirm the opinion I have already expressed that the maxim cujus est solum

(9) Cmd. 9218 p. 24.

(10) Ibid. p. 8.

(11) Ante p. 25.

(12) Cmd. 9218 p. 22.

ejus est ad coelum usque ad inferos is an integral part of the law both of England and of Scotland.(11) There would appear to be no justification for depriving the landowner of his rights in the airspace above his property to this almost unlimited extent. Should damage be occasioned, he is, of course compensated in a certain measure by the provisions whereby the aviator is to be liable absolutely for such damage. This was a great advance on the common law. The maxim res ipsa loquitur would have placed the burden of proof on the aviator, and, although there was doubt as to whether the doctrine expressed in *Rylands v. Fletcher* would have applied, assuming that it had, vis major or the Act of God would have been a valid defence open to him. Under the provision proposed by the Special Committee, even this defence was denied him. The hardship, however, was more apparent than real and any argument against the proposals must surely have been fully met by the statement in the Report that they would impose on aviators no burden which "could not be covered by insurance at reasonable rates." (12)

The other matters dealt with in the Reports are interesting but not sufficiently important to warrant inclusion here, with the exception perhaps of the particular attention given to methods of procuring safety for the ordinary population. Prior to 1914 these had taken the form of licensing pilots and certifying the aircraft themselves as airworthy, or by one or other of those means. The licensing of

(11) Ante p. 25.

(12) Cmd. 9218 p. 22.

Pilots called for no comment but the provisions as to airworthiness appearing in the draft Convention of 1910 were not acceptable. Under that Convention each separate aircraft would have required to pass tests before obtaining an airworthiness Certificate, and this seemed to the Committee to impose a severe restriction on the development of aviation. Rather than run such a risk they recommended the ensuring of safety by providing for the competency of pilots by stringent regulations. Accordingly, it was suggested that all that was required was the certifying of the first of any new type of aircraft, and once a Certificate was issued in respect thereof, the others, if they were guaranteed to be of the same type and construction would not require to be specially certified.

Great Britain was not alone in recognising the effect of the rapid development of aeronautics. The United States of America was also to the fore in attempting to find some unified Code of Law to be applied there. The legal position in America is peculiar in so far as the position of the various States comprising it is concerned, but it has this advantage that its vast extent lends itself naturally to a development of aviation on a scale which is not possible in a country of the size of Great Britain. Therefore aviation law in the United States was more fully developed at an earlier stage than the laws of other countries and judicial decisions are not lacking. As I purpose mentioning in succeeding chapters, for the sake of comparison, certain aspects of American aviation law it is well to record at this stage that in May 1916

a Congress of the Pan American Aeronautic Federation held at Santiago, Chile, succeeded in drawing up a fairly detailed set of principles to be observed in the development of the law. While navigation of the airspace above the American Continent and adjacent seas was agreed to be free to all Americans and domiciled aliens, it was declared that the airspace was State property and States were to have sovereign rights in their own airspace. All aircraft were to carry a distinctive national emblem and to have a nationality, public aircraft having that of the State to which it belonged, and private aircraft that of their owner, the latter provision being specially significant. Even Rules of Warfare were agreed upon and aerial warfare was to be regulated so as to minimise the danger to non-combatants. On its entry into the Great War, America put a restriction on civilian flight by designating the whole of the United States its territorial waters and insular possessions of the Panama Canal Zone as a zone of military operations and of military preparation, within which flight could only be carried out by special license which was required for each and every proposed civilian flight.

Bearing in mind the effect of the Great War on the development of aircraft, with the resulting rapid construction, which left at the conclusion of the peace an immense surplus of all types of aircraft ready to be adapted to peaceful pursuits, the actual development of the law during that time, and the changed outlook which war had brought about,

it will be readily recognised that international agreement on the major legal issues involved was within reach when the conflict ended. Not only could it be attained, but the position of aviation made it essential that it should be attained. The prospects of agreement on an International Aerial Convention were more hopeful now than they had been at any time before. Aviation law had entered upon the third stage of its development.

The Post War Structure.

When the Treaty of Peace was signed at Versailles in June 1919, the whole outlook of the world had changed. The war which was to bring universal peace and nations had entered upon a new order of things - or, at least imagined they had - much as had been envisaged by Mr. Rich-

PART, III.

POST WAR LEGISLATION AND DEVELOPMENT.

years may have brought disillusionment and a strong tendency for nations to regard one another's movements much as they had done before 1914, but the spirit of peace and goodwill which has characterized so many of the acts done shortly after the War must be regarded as having had its effect also on the provisions which were made for the regulation of aviation. It would not be possible to say to what extent the development of aviation law was affected by the general outlook in 1919, but the fact remains that this branch of the law has developed, and will continue to develop along lines which are peculiar to it alone. The international character of flight which I have already mentioned as more than one occasion no doubt contributed largely to the particular nature of the development of the law but it must be conceded that the Great War and the change of outlook which followed it made their impression. Had there been no war the development would have been slow and one is left to wonder whether the law would ever have developed along the same lines.

Chapter 7.

The Post War Structure.

When the Treaty of Peace was signed at Versailles in June 1919, the whole outlook of the world had changed. The war which was to bring universal peace had ended and nations had entered upon a new order of things - or, at least imagined they had - much as had been envisaged by Mr Pick when he dissented from the Majority Report of the Civil Aerial Transport Committee. (1) Sixteen years may have brought disillusionment and a strong tendency for nations to regard one another's movements much as they had done before 1914, but the spirit of peace and goodwill which has characterised so many of the acts done shortly after the War must be regarded as having had its effect also on the provisions which were made for the regulation of aviation. It would not be possible to say to what extent the development of aviation law was affected by the general outlook in 1919, but the fact remains that this branch of the law has developed, and will continue to develop along lines which are peculiar to it alone. The international character of flight which I have already emphasised on more than one occasion no doubt contributed largely to the particular nature of the development of the law but it must be conceded that the Great War and the change of outlook which followed it made their impression. Had there been no war the development would have been slow and one is left to wonder whether the law would ever have developed along the same lines.

(1) Ante. p.117.

Aviation law is now surrounded by a complex and elaborate structure and is being moulded and developed in a manner in which no other branch of the law has developed. Not only does it rest on an International Convention, but a permanent International body exists to gather, and, in its turn, to distribute all available information as to the particular national laws, rules and regulations as they are promulgated, and numerous International organisations meet regularly with but one object, and that to discuss and recommend new laws as well as to amend the old. In fact, if there existed some such organisation as an International Aeronautical Court, aviation law would be a separate and complete entity. Even that is under consideration for the Fifth International Congress on Aviation Law held at the Hague in September 1930 recommended that the various International legal organisations should consider the question of creating an International Court which would be accessible to private individuals and which would eventually be able to solve the numerous questions raised by the application of the Conventions on Private Air Navigation Law.

The Treaty of Peace itself contained certain clauses affecting aerial navigation, and, while these are now perhaps of no more than historic interest, they should perhaps be mentioned. The Air Clauses (Arts. 198-202) had the effect of prohibiting Germany from maintaining a military air force while providing for freedom of passage through the air, as well as freedom of transit and of landing, being accorded to the aircraft of the Allied and Associated

(2) Convention of 1919, Art. 23.

For example, the United States of America, while a Powers until the complete evacuation of Germany had taken place. Aerial Navigation was dealt with under Part XI of the Treaty (Arts. 313 to 320) which applied until 1st January 1933. The underlying principle was that until Germany could be authorised to adhere to the Convention relative to Aerial Navigation the rights of the private aircraft of the victorious Powers in German air space were to be safeguarded and Germany was to obey the various Rules of the Air and Rules for Air Traffic which were to be laid down in the Convention.

Concurrently with the Treaty of Peace, the Allied and Associated Powers set about framing an International Convention relating to the Regulation of Aerial Navigation similar to that which had been anticipated in 1910 and, with the spirit which prevailed, it would have been well nigh impossible to fail to reach agreement. So it was that on 13th October 1919 the Convention was signed at Paris. It came into force on 11th July 1922 in respect of fourteen of the signatory States and of Persia which had taken advantage of the provisions enabling it to notify its adhesion. The Convention is presently in force between thirty States and is the basis on which the various national legal systems are founded. It was expressly provided that in case of war the provisions of the Convention should not affect the freedom of action of the contracting States either as belligerents or as neutrals. (2)

The Convention is not universally recognised and there are several notable exceptions.

(2) Convention of 1919, Art.38.

For example, the United States of America, while a signatory, has not ratified it, and Germany, which could not at the time be a party, has not yet adhered, although this would have been possible both under Article 320 of the Treaty of Peace and the Convention itself, and, having left the League of Nations, is not at the moment likely to do so. Both countries are important from the point of view of aviation, for in both flight has reached a high degree of perfection. Nevertheless they are observing virtually the same provisions, for, the Pan American Convention closely resembles the Paris Convention, and under Article 5 of the latter provision was made whereby contracting States were free to enter into bilateral Conventions with non-contracting States. At the present moment there are thirty three such Conventions in force, excluding those entered into for the sole purpose of permitting the operation of certain regular air traffic services, and their terms are almost identical with those of the Paris Convention.

The position in Great Britain is that it is bound by the Convention of 1919 to which it has adhered, and has concluded bilateral Conventions of a similar nature with Germany and Austria, besides concluding Conventions with Sweden, Holland, Greece, Italy, and Switzerland regarding air transport services. The existing national law is to be found in the Air Navigation Act of 1920 (10 & 11 Geo. V. Ch.80) and in the numerous Statutory Rules and Orders and Air Navigation Directions issued under that Act. The Air Navigation Act applied to

England, Scotland, and Ireland, and by Order in Council could be applied to any British Possessions other than those mentioned in the Schedule to the Act, and to any territory under His Majesty's Protection. By Order in Council dated 6th February 1922 (3) the Act was applied to certain Colonies and Protectorates, and by a like Order on 20th December 1927 (4) was applied to the Mandated Territories of the British Cameroons, British Togoland, Palestine, and Tanganyika Territory. The various Statutory Rules and Orders applicable in Great Britain have, with the necessary modifications, been applied to these Colonies, Protectorates, and Mandated Territories since 1927. They were also made applicable to Guernsey on 14th December 1925 (5) and to Jersey on 6th February 1928 (6).

The New World furnishes another example of a collective Convention for the purpose of regulating aviation law and in the United States the legal structure has much in common with that in Great Britain. The differences in the national law where they exist are accounted for by the position of the States comprising the United States of America for each individual State claimed sovereign rights in its own air space, and, therefore, a right to enact its own laws. The difficulty appears to have been, and still is, to find the exact extent to which Federal control could be exercised, but it seems to be generally accepted that there is a concurrent control between the Federal Government and each particular State.

(3) S.R.O.No.121.(1922)
(4) S.R.O.No.1244.(1927)
(5) S.R.O.No.1583.(1926)

(6) S.R.O.No.91(1928)

The position of the South American Republics necessitated some unification of the laws existing throughout the whole of the American Continent similar to that in Europe, and it is not surprising, therefore, to find a Pan American Convention on Commercial Aviation being signed at Havana on 20th February 1928, to which Convention the signatures of the United States and twenty four Latin American States were appended. Of those countries, eleven, including the United States, have deposited Ratifications. This Convention, in the American Continent, can, for the purposes of comparison, be taken as corresponding to the Paris Convention of 1919 in Europe.

The fact that the Convention was signed by the United States and ratified by Congress shows that the Federal Government considers that it has sovereign rights in the air space over the whole of the United States. This is further borne out by the Bi-partate Agreements entered into by the Federal Government, but apparently a decision of the Supreme Court is awaited to clarify the position, since several individual States maintain absolute sovereign rights in their own airspace.

This asserted dual control is further seen when one considers the American equivalent to the British Air Navigation Act of 1920. It is to be found in two sources, the Air Commerce Act of 1926, produced by the Government, and the Uniform State Law of Aeronautics, prepared by the American Bar Association and adopted in whole or in part by the individual States. Under the Constitution of the United States, the control of Congress is

limited to regulating commerce between the various States and this limitation is to be found in the Air Commerce Act, which, according to its title, was intended "to encourage the use of aircraft in commerce and for other purposes." At the same time it must not be forgotten that it was only the Interstate Commerce Clause of the Constitution which rendered legislative action possible by Congress. The Act contains little information on the many points of law which had been in doubt, and the legal principles are found rather in the Uniform State Law. The Air Commerce Regulations which took effect on 31st December 1926 may be taken as the equivalent of the British Statutory Rules and Orders and Air Navigation Directions.

The remaining example of a collective Convention is that concluded at the Spanish-American Conference held at Madrid in October 1926 in which Spain and twenty Latin American States participated. Of these, five, including Spain, deposited Ratifications. Except in certain minor respects, the text of the Paris Convention was adopted and as the differences in the latter have been brought in line by a Protocol of 1929, there is, according to the declaration of the Spanish delegate to the Conference which drew up the Protocol, no longer any reason why the two Conventions should be separate.

The International Commission for Air Navigation -

When the Paris Conference of 1910 concluded its labours, the following recommendation was added to the Draft Convention

"That the Governments shall study the question how far it would be useful to set up an International Board

"for Aerial Navigation, and consider what powers should be conferred on such a Board."

The recommendation did not fall on barren ground.

It fell on rich and fruitful soil, and, that, together with the then prevailing spirit, enabled the Paris Convention of 1919 to provide that "there shall be instituted, under the name of the "International Commission for Air Navigation, a "permanent Commission placed under the direction of "the League of Nations." (7)

The composition and powers of the Commission are fully detailed in the Article under which it is constituted. It is the organisation to which is entrusted the whole international control of aviation. Its first meeting was held on 11th July 1922 when the decision was taken to meet at regular intervals, and, for the first few years, until 1930, the Commission met half-yearly. Since then it has held annual sessions and has issued twenty two Official Bulletins to keep the public informed of its activities. It possesses a permanent headquarters and a permanent secretariat and there is not one single topic connected with aviation or aviation law to which it does not give attention. The work is performed by six sub-commissions of which the Legal Sub Commission is by no means the least important.

The I.C.A.N. - to use the letters by which it is generally known - is a composite organisation being at one and the same time a Council charged with seeing to the application of the Convention and of assuring its normal working by proposing to the States represented, at the appropriate times, the amendments called for by the development of international air navigation; a kind of International Parliament with

power to adapt technical rules to the exigencies of air traffic; a Court deciding the differences which arise as to the interpretation of technical rules; a Consulting Committee giving advice on problems submitted to it for examination by any particular State; and an organisation for collecting and distributing all the intelligence which is indispensable to the aviator. It is indeed a unique organisation to which there is no parallel in the realm of the law, or, for that part in any other sphere.

The statement that the I.C.A.N. is a "Court deciding differences which arise as to the interpretation of technical rules" requires further explanation. The authority for the statement is to be found in Article 37 of the Convention which makes provision for settling disputes which might arise between two contracting States either as to the interpretation of the Convention, or, as to the technical regulations annexed to it. The former class of dispute was to be referred to the Permanent Court of International Justice when established, and, until then, by Arbitration, the procedure for which was fully detailed. The latter class was to be referred to the I.C.A.N. but if doubt existed as to the class into which a dispute fell, it was to be decided by Arbitration. A slight alteration was made by the Protocol of June 1929 in regard to the provisions as to arbitration in the first

class of dispute. These are still to be referred to the Permanent Court, but it is provided that if any one of the States concerned has not accepted the Protocol of the Court, the question in dispute shall, on the demand of such State, be settled by Arbitration.

The actual provision now being discussed reads

"disagreement relating to technical regulations annexed to the present Convention shall be settled by the decision of the International Commission for Air Navigation, by a majority of votes."

This has the effect of putting the Commission in the position of a judicial tribunal with a very limited competence. It cannot decide as to the interpretation of the Convention. That falls to be dealt with either by the Permanent Court or by Arbitration. It can only adjudicate on disagreement as to the meaning of technical regulations, and then only if there is no doubt as to whether the disagreement in any way involves an interpretation of the Convention.

Nevertheless, when it does operate, the Court so formed has several interesting features, both in its composition and in its procedure. M. Kroell has written

"A vrai dire c'est le plus vaste tribunal qui existe." (8)

The I.C.A.N. is comprised of thirty States, each having one vote, and accordingly, the tribunal has thirty judges. But that is not all, for the judges are States themselves, and in this respect alone the Court is unique.

(8) La Fonction judiciaire de la C.I.N.A., R.A.I. No.14. p.444.

Its Code of Procedure is to be found in a Resolution of the Commission (9) and became effective as from 1st June 1923. The first step is that each of the States concerned may request that Article 37 be applied and to do so shall transmit to the General Secretary a Memorandum explaining the matter in dispute and informing him of the names of the States concerned. This being done, the Secretary transmits copies of the Memorandum to such States who are allowed three months in which to lodge counter Memoranda and any other relevant information. As soon as this is done, or at the expiry of three months, the whole documents are communicated by the Secretary to the other States members of the I.C.A.N.

The matter now comes before the first Session of the Commission when a Committee of five members is appointed to deal with it, hear the representatives of the States concerned, and report to the next Session of the Commission, unless in cases of extreme urgency, when the whole question may be decided during the first Session or at an Extraordinary Session called for the purpose.

The Commission issues its decision to the interested States after having examined the Report, heard the representatives of the interested States, and taken the advice of its Judicial Sub-Commission.

This phase of the Commission's activities is not without interest but so far has not been taken advantage of and its value when in operation cannot be estimated. The explanation is, no doubt, to be found in the other of its multifarious

activities - that of an International Parliament with power to adapt technical rules to the exigencies of air traffic. So far this has proved to be the easier and more satisfactory way of settling disputes which have arisen since the disagreements have invariably been caused by technical development which necessitated a different interpretation being put on an existing rule or regulation. That being so, while a system of law is being developed, amendment rather than judicial interpretation is to be favoured, but the time will come when the judicial functions of the I.C.A.N. will serve an increasingly useful purpose.

The Pan American Convention sets up an equivalent to the I.C.A.N. by providing that the Pan American Union is to co-operate with the Governments of the Contracting States to attain the desired uniformity of laws and regulations for aerial navigation in the States parties to the Convention, (10) but it is a poor substitute for the I.C.A.N.

"The superiority of the I.C.A.N. over the arrangement set up by the Havana Convention is too obvious to necessitate any defence. Under the Convention of 1919, Experts keep that Convention up to date; under the American system of aerial agreements this benefit is denied to the United States Government. Such a denial is an undoubted retardation of our aerial development which could be removed by our becoming a party to the Convention of 1919." (11)

Even the provisions for the settlement of disputes, be they of interpretation or as to technical rules, are inferior to those provided by the 1919 Convention for disputes cannot yet be referred to the Permanent Court and the Pan American Union cannot

(10) Pan American Convention, Art.32.

(11) "U.S. Commitments on International Aerial Navigation", Gibson, R.A.I., No.11, pp.76-77.

undertake in this respect to act as a judicial and tribunal. All disputes therefore fall to be settled by Arbitration under Article 36 of the Havana Convention.

If the I.C.A.N. was the only organisation on which aviation law depended for its development it would be well supplied, but it is not, and there are several other bodies whose work is devoted to this purpose. Since 1919, no fewer than eight other International Conferences or organisations have directed their attentions to aeronautics and to aviation law. Of these two were Governmental, cf. the Conferences of International Private Law, three were officially recognised by the Governments concerned, cf. the International Aeronautic Conferences, and three were the result of private enterprise, cf. the International Aeronautic Federation. In addition two other Governmental, five officially recognised, and four private Conferences have discussed aviation law in the course of their deliberations, the most important, from the legal point of view, being the International Law Association.

The Paris Convention -

The Paris Convention of 1919 is of sufficient importance to merit more than a mere passing reference. It consists of a main text of forty three Articles, divided into nine Chapters, and eight Annexes dealing respectively with the marking of aircraft, certificates of airworthiness, log books, rules as to lights and signals and rules for air traffic, the minimum qualifications necessary for

obtaining certificates and licences as pilots and navigators, international aeronautical maps and ground markings, the collection and dissemination of meteorological information, and customs. In conformity with the objects for which it was set up, the I.C.A.N. has been diligent in its efforts to amend the Convention to meet the rapidly changing circumstances, and, in consequence, in the Annexes to the Convention, very little of the original text remains. Most of them have been completely altered.

In the main text of the Convention there has not been much in the way of alteration although what has been is important. I shall now deal with those changes, and thereafter consider the chapters of

the Convention dealing with the rules to be observed on departure, when under way, and on landing, prohibited transport, state aircraft, and the final provisions. The remaining parts of the Convention are considered elsewhere.

The first changes were actually made in the Draft Convention before it was signed, and, apart from the mere altering of the position in which certain provisions were placed, contained three amendments which were of a material nature. In the first place, in the original Draft, aircraft engaged in flight across the territory of a contracting State, including the necessary landings and stoppages, were exempt from seizure on the ground that the constitution or mechanism of the aircraft was an infringement of any patent, design, or model duly granted or registered by that State, and every claim for an infringement of that kind was to be duly made in the country of the origin of the aircraft. As the

to enter into special Conventions with States
Convention was signed, the aircraft would only be
not parties to the Convention. The I.C.A.N.,
exempt from seizure on
from the commencement of its activities, discussed
"the deposit of security, the amount of which in
"default of amicable agreement shall be fixed with
"the least possible delay by the competent authority
"of the place of seizure." (12)

In the second place, a clause was inserted in the
Draft defining the jurisdiction to be exercised in
respect of acts committed on board an aircraft, but,
as the result of representations made by some of the
powers, the Article was omitted from the final text.
The terms of the Article itself will be considered at
a later stage. (13) In the third place, the time
limit of one year which was fixed for ratification
was not included in the Convention as signed.

Further amendments have been made by four
Protocols. The first of these was mainly concerned
with the amendment of Article 5 of the Convention
which provided that

"no contracting State shall, except by a special and
"temporary authorisation, permit the flight above
"its territory of an aircraft which does not possess
"the nationality of a contracting State."

The effect of this Article in such a form was a
severe handicap to aviation, for, unless every State
adhered, international flight over the territory of
contracting States would only have been possible to
the aircraft of non-contracting States after what
would doubtless have proved to be a slow and tedious
process of obtaining the requisite temporary
authorisation. This caused the countries which were
neutral during the War, and, therefore, not signatories
of the Convention, to meet at Copenhagen in December
1919 to consider it and adopt a resolution recommend-
ing that contracting States should have the right

(14) Ante. p.127.

(15) Archiv für Luftrecht, Vol.III. fasc.1. Jan.-Mar.1923.

(12) Art.18.

(13) Post. p. .

to enter into special Conventions with States
the German Government and the Governments of all
not parties to the Convention. The I.C.A.N.,
countries not parties to the Convention, certain
from the commencement of its activities, discussed
suggestions for its amendment were agreed upon and
this problem with the result that the Protocol of
these were given effect to by the I.C.A.N. in a
October 1922, which entered into force on 14th
Protocol dated 15th June 1929. A further Protocol
December 1926, added the following proviso to the
was signed on 11th December 1929, and both Protocols
Article

"unless it has concluded a special convention with
"the State in which the aircraft is registered. The
"stipulations of such special Convention must not
"infringe the rights of the contracting parties made
"to the present Convention and must conform to
"the Rules laid down by the said Convention and
"its Annexes. Such special Convention shall be
"communicated to the International Commission for
"Air Navigation which will bring it to the knowledge
"of the other contracting States."

This made the position much more elastic and the
"special Conventions with non-contracting States."
proviso has been widely taken advantage of, being
The provisions of such special Conventions must not
the authority under which the thirty three bilateral
infringe the rights of the contracting parties to
Conventions mentioned above were concluded. (14)

The Copenhagen Conference had also passed
"in so far as may be consistent with their objects"
a Resolution recommending equal voting rights on
must not be contradictory to the principles of that
the International Commission, and, this having been
Convention. The whole purport of the Article as it
given effect to in the second Protocol dated 30th
first appeared is accordingly changed.
June 1923, and which also entered into force on 14th
The Chapter concerning the rules to be
December 1926, Sweden, Denmark, Belgium, and Norway
observed on departure, when under way, and on landing
were enabled to adhere to the Convention.

The third and fourth Protocols are of a
the rules as to lights and signals and the rules for
more extensive nature and are the direct result of
air traffic, contains little of note and no legal
Dr. Wegerdt's article published in October 1928,
principles is involved. Briefly, the maritime
entitled "Germany and the Paris Air Convention of 1919".

(15) Following a suggestion made in that Article, a
and the documents to be carried by aircraft. A
Conference was called by the I.C.A.N. in June 1929
leg book must be carried. The authorities have
to which were invited, not only the Governments of
a right to visit any aircraft and verify the
States parties to the Convention, but also the
documents carried and the contracting States

are taken bound to ensure that every aircraft
(14) Ante. p.127.
(15) Archiv für Luftrecht. Vol.III. fax.1. Jan.-Mar.1933.

the German Government and the Governments of all countries not parties to the Convention. Certain suggestions for its amendment were agreed upon and these were given effect to by the I.C.A.N. in a Protocol dated 15th June 1929. A further Protocol was signed on 11th December 1929, and both Protocols came into force on 17th May 1933. Several Articles were amended but it will be sufficient to notice here the further change made in Article 5 which had first been amended by the Protocol of October 1922. A new Article has been substituted whereby

"each contracting State is entitled to conclude special Conventions with non-contracting States." The provisions of such special Conventions must not infringe the rights of the contracting parties to the Convention and "in so far as may be consistent with their objects" must not be contradictory to the principles of that Convention. The whole purport of the Article as it first appeared is accordingly changed.

The Chapter concerning the rules to be observed on departure, when under way, and on landing with which must be taken the relative Annex giving the rules as to lights and signals and the rules for air traffic, contains little of note and no legal principle is involved. Briefly, the maritime analogy is followed, both in the rules of the air and the documents to be carried by aircraft. A log book must be carried. The authorities have a right to visit any aircraft and verify the documents carried and the contracting States are taken bound to ensure that every aircraft carrying its nationality mark will observe the rules

laid down in the Annex. The succeeding Chapter on Prohibited Transport lays down certain restrictions as to what may be carried on aircraft, restrictions which are to apply equally to national and foreign aircraft. While the carriage or use of photographic apparatus may be prohibited, and other objects also, if public safety demands this, the carriage by aircraft of explosives and of arms and munitions of war is forbidden. It is not easy to understand why air transport should be hindered by such a limitation. Certainly the prohibition of the carriage of explosives can be justified on the ground of public safety, but little is to be gained by prohibiting the carriage of arms of war, such as rifles, by air.

The Chapter on State Aircraft is more important. Military aircraft, and aircraft employed exclusively in State service, such as posts, customs, and police, are to be classified as State Aircraft. All other aircraft are deemed to be private aircraft to which the Convention applies, and, of the State aircraft, only military, customs, and police aircraft are not subject to its provisions. Under Article 31 "every aircraft commanded by a person in military service, detailed for the purpose, shall be deemed to be a military aircraft," and such military aircraft are prohibited from flying over the territory of another contracting State, or landing, without special authorisation. In such a case, the aircraft shall in principle, and in the absence of special stipulation, enjoy the privileges customarily accorded to foreign ships of war.

The Final provisions of the Convention are considered to be identical except in so far as alteration is necessary to suit changed circumstances.

for

"of the forty two Articles of the Paris Convention of fairly numerous and, for the most part, of a formal character, but in one other respect deserve mention. The Air Navigation Act 1920 and Orders made thereunder. The scope and effect of the Convention depended on the elaborate provisions which were made for adhesion and denunciation, especially the former, since the Convention was the work of the Allied and Associated Powers just as the Treaty of Peace was. Adhesion to the Air Navigation Convention was accordingly encumbered with much the same provisions as was aircraft, for regulating the navigation thereof both within such jurisdiction and elsewhere, and, also to whether or not a State was a signatory of the Peace Treaty and whether or not it took part in the War. The Protocols of June and December 1922 have now clarified and simplified the position, for, in place of the unfortunate Articles, 41 and 42, of the original Convention, there appears a new Article 41, to the effect that

"Any State shall be permitted to adhere to the present Convention.

"This adhesion shall be notified through the diplomatic channel to the Government of the French Republic, and by it to all the signatory or adhering States."

This Article did not take effect until May 1933, and it is greatly to be regretted that this "Charter of the Air" should have continued for so long to be stamped with the hall-mark of war, of victor and of vanquished. It was indeed a short sighted policy to impede the development of an essential branch of the International Law in such a manner.

Apart from the coupling of "naval" aircraft under the heading of State aircraft, a provision which has much to commend it, the provisions of the Pan American Convention corresponding to those just considered are identical except in so far as alteration is necessary to suit changed circumstances,

for

"of the forty two Articles of the Paris Convention of 1919, a generous majority have been adopted in spirit if not in terms by the Havana Convention." (16)

The Air Navigation Act 1920 and Orders made thereunder.

The Air Navigation Act was passed on 23rd December 1920, according to its Preamble, for two purposes, namely, to make further provision for controlling and regulating the navigation of aircraft, whether British or Foreign, within the limits of His Majesty's jurisdiction, and, in the case of British aircraft, for regulating the navigation thereof both within such jurisdiction and elsewhere, and, also to enable effect to be given to the Convention of the previous year. It repealed the Air Navigation Acts, 1911 to 1919. I have already referred to the Acts of 1911 to 1914. The further Act passed on 27th February 1919 giving effect to some of the recommendations of the Civil Aerial Transport Committee was a temporary one and on its authority detailed Regulations were issued on 30th April of that year, remaining in force until subsequently superseded by those issued under the Act of 1920.

This Act, which does not apply to aircraft belonging to His Majesty or exclusively employed in His service, although by Order any of its provisions may be applied to such aircraft, (19) was mainly an enabling Act, matters of detail being left to the Orders in Council which would follow it. In particular, it was provided that by Order in Council effect would be given to the Convention (17) and its provisions could be applied to or in relation to any aircraft in or over the British Isles or the territorial waters adjacent thereto. (18) Further, without prejudice to the general powers, the various special provisions detailed

(16) Bouvé, Air Law Review, Vol.1. p.3.

(17) Sec.1.

(18) Sec.2.

(19) Sec.18.

in the Third Section of the Act could also be made by Order in Council. Of these, perhaps the most important were the provisions to be made as to the conditions of carriage of passengers and goods, for supplementing the Convention by general safety regulations, and for the imposition of penalties to secure compliance with the Order or with the Convention.

Again, several sections of the Act and an extensive portion of the Orders issued under its authority, fall to be discussed in the chapters which follow, but there are three major subjects which do not fall readily within the scope of any particular chapter and are not dealt with subsequently. These are, the acquisition of land; offences and the penalties in respect thereof; and the investigation of accidents.

With regard to the first, the acquisition of land, provision is made for two cases, where the Air Council is acquiring it and where a Local Authority is acquiring it. A Local Authority is, in England, the Common Council of the City of London, the Councils of Counties and County Boroughs, and Urban District Councils, and, in Scotland, County Councils and Town Councils. Either the Air Council or an authorised Local Authority is empowered to establish and maintain aerodromes (20), and a Local Authority may carry on in connection therewith any subsidiary business certified by the Air Council to be ancillary to the carrying on of an aerodrome. (21) For this purpose, power is given to acquire land.

(20) Sec.8(1)

(21) Sec.8(3). The sale of petrol and oil has been so certified since 1929.

In the case of the Air Council this will be by purchase or hire (22) and

"the power of a Secretary of State to acquire land under the Military Lands Acts, 1892 to 1903, shall include power to acquire lands for the purposes of this Act and generally for the purposes of civil aviation, and those Acts shall have effect accordingly with the necessary modifications, and in particular as though references to a military purpose included references to any such purposes as aforesaid." (23)

In the case of a Local Authority, the acquisition is limited to agreement (24), and, for that purpose,

"the Lands Clauses Acts shall be incorporated with this Act except the provisions of those Acts with respect to the purchase and taking of land otherwise than by agreement." (25)

The provisions relating to Local Authorities, however, are largely superseded since a power of compulsory purchase of land for aerodromes is generally included in any Bill in Parliament promoted by such Local Authorities.

With regard to offences, the Act makes provision for a fine or imprisonment, or both,

"where an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property on land or water." (26)

The penalty is incurred by the pilot or person in charge, and also by the owner unless he can show that the aircraft was flown "without his actual fault or privity". The Section may seem severe but some such enactment is essential for the protection of the unfortunate individuals on the ground below. It will be observed that the penalty is limited to the case where such person or persons or their property are exposed to unnecessary danger, the constitution of which will be a matter of proof in each case as it arises. Some general principles will be evolved

(27) Sec.10(2).

(22) Sec.8(1). (24) Sec.8(1)

(23) Sec.15. (25) Sec.8.(5)

(26) Sec.10.(1).

in time to come and there have already been convictions under the Act.. Flight which causes unnecessary danger to other aviators is not included. This may be on the assumption that an aviator flying in a manner dangerous to other aviators would be causing unnecessary danger to himself - one which he is not likely to run - but the Section would have been more complete had it embraced this offence also.

The foregoing provisions, it is declared, "shall be in addition to and not in derogation of "any general safety or other regulations prescribed "by Order in Council." (27)

Those other regulations are numerous and are to be found in the Air Navigation (Consolidation) Order 1923 and the amending Orders. Briefly stated they are as follows.

An aircraft shall not fly over any city or town except at such an altitude as will enable it to land outside the city or town should its means of propulsion fail (28) and, if it is not designed to manoeuvre on the water, a machine carrying passengers for hire or reward shall not engage in flight over the sea or inland waters unless in similar circumstances it would be able to reach land. (29) An aircraft cannot carry out any trick flying or exhibition flying over any city or town area or populous district, nor over any regatta or other public meeting unless where this is specially arranged for by the promoters of such regatta or public meeting, and, following closely the provisions of the principal Act, an aircraft shall not be flown

(27) Sec.10(2).

(28) S.R.O. No.1508.(1923),Sec.9(1).

(29) S.R.O. No.1102.(1934),Sec.1.

"in such circumstances as, by reason of low altitude
"or proximity to persons or dwellings or for any
"other reason, to cause unnecessary danger to any
"person or property on land or water." (30)

This section of the Order was discussed in the case of Rex v Brie at the Kingston Petty Sessions on 18th October 1933, and on appeal at Surrey Quarter Sessions on 17th November of that year. The offence was low flying in the vicinity of an aerodrome and it was held that a pilot could not be convicted under the section merely because the persons on the ground were alarmed, unless it could also be shown that there was justification for such alarm. While it would not protect a pilot who flew unnecessarily low thus causing danger in the event of an error of judgment on his part, engine failure, or other unforeseen cause, it would protect an aviator engaged in normal flight near an aerodrome even although he had to come so low that he caused alarm in the minds of persons on the ground. In another case, in the Caistor (Lincs.) Police Court, a conviction was obtained against a pilot under the Section who flew low to enable a mother on the ground to take a photograph of her daughter who was in the aeroplane. As a result of the manoeuvre the mother was struck by the plane and killed. The penalty is the same whether the offender is charged under the principal Act or under the Consolidation Order.

Smoking in aircraft is only permitted to the extent allowed under its Certificate of Airworthiness, and it is an offence to smoke in contravention of this provision. (31) It is also an offence to interfere with the crew or equipment of an aircraft

(30) S.R.O.No.1260.(1925).

(31) S.R.O.No.743.(1933),Sec.1.

or commit any act by any other means to the extent of imperilling its safety, (32) as it is to carry any person in any part of the aircraft not designed for the accommodation of the personnel or passengers.(33).

So too it is an offence to photograph a prohibited area (34) except with special permission; for any pilot or member of the crew to be in a state of intoxication (35); or for any person to enter or be in an aircraft in such a condition (36); and, except by special permission, to land by parachute, unless in cases of emergency, or to drop anything from an aircraft (37). Thus the Lincolnshire farmer who recently in jest dropped an egg from an aeroplane was fined for his exuberance. There is, of course, another aspect of this question of dropping articles from aircraft, and that from the point of view of sanitation and public health. As flying becomes more popular and aircraft are perfected to meet human requirements, the disposal of sewerage produced on board must be carefully regulated as nothing would be more seriously detrimental than that any such sewerage should be dropped on to the subjacent ground. Under the International Sanitary Convention for aerial navigation, recently signed but not yet ratified by the British Government, aircraft in flight are forbidden to throw or let fall matter capable of producing an outbreak of infectious disease.

Further examples of offences, such as piloting an aircraft while under seventeen years of age (38) and the like are to be found throughout the various Orders and Schedules but sufficient have been enumerated to show the great diversity of the offences which can be committed in connection with aircraft. While it is not yet generally

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|-----------------------------------|-------------------------------------|
| (32) S.R.O.No.263.(1927) | (36) S.R.O.No.1260.(1925). |
| (33) S.R.O.No.743.(1933),Sec.2. | (37) S.R.O.No.712.(1934),
Sec.1. |
| (34) S.R.O.No.1508.(1923),Sec.11. | (38) S.R.O.No.905.(1934). |
| (35) do. Sec.12. | |

where it appeared to be expedient, the Secretary of State could appoint some competent persons to constitute at this early stage, far outnumber those which even a Court to make a formal inquiry into the causes of the erring motorist can commit under the Road Traffic Act. But the penalties are much heavier, and for any offence, no matter how trivial, the penalties need be given are limited and apparently notice of an accident occurring to a private aircraft need only be given when the accident involves death or serious injury to some person, whether carried in the aircraft or not, six months, or to both fine and imprisonment. (39)

With regard to the investigation of accidents, this is covered by Section 12 of the principal Act, by virtue of which the Secretary of State may make regulations providing for the investigation of any accident, and such regulations may provide for notice being given of any accident, prohibiting access to any aircraft while the accident is under investigation, and authorising or requiring the cancellation, suspension, endorsement, or surrender of any Licence or Certificate, where it appears on investigation that this would be necessary. A penalty is provided should any person contravene any regulations under the Section.

The first regulations, which applied to accidents occurring in or over the British Islands, or which occurred elsewhere to British aircraft registered in the British Islands, came into force on 12th July 1922, and provided for notice of any accident, containing the particulars set forth in the regulations, being sent to the Air Ministry after which an "Inspector of Accidents" would make a preliminary investigation to be known as an "Inspectors Investigation". (40) In more serious cases

(39) S.R.O.No.1508.(1923),Sec.27.

(40) S.R.O.No.650.(1922);No.381.(1935).

where it appeared to be expedient, the Secretary of State could appoint some competent person to constitute a Court to make a formal Inquiry into the causes of the accident. This is known as a "Court Investigation". By the Order of 1st June 1935 the cases in which notice need be given are limited and apparently notice of an accident occurring to a private aircraft need only be given when the accident involves death or serious injury to some person, whether carried in the aircraft or not. By subsequent regulations power was taken to extend the foregoing provisions to the Channel Islands (41) and to apply them to Crown aircraft, defined as those belonging to or exclusively used in the service of His Majesty, other than naval, military, or airforce aircraft. (42) There is as yet no obligation to notify the authorities of any foreign State of an accident occurring to an aircraft, registered in that country, in or over the British Islands. The obligation to do so would rest on the Air Ministry and it might even be desirable to have a representative of that State present at any enquiry held. However, the matter is one for international agreement.

The power given in the principal Act to apply Section 3 of the Notice of Accidents Act (43) by which the Board of Trade is given power to hold a formal investigation has not yet been taken advantage of.

Otherwise, the numerous Orders made under the principal Act are mainly concerned with laying down the detailed conditions under which flight is permitted. The Consolidation Order and subsequent Orders amending it apply to all British Aircraft wherever such aircraft may be and to other British

(41) S.R.O.No.1099.(1925). (42) S.R.O.No.840.(1930).

(43) Air Navigation Act, Sec.12(2)(b).

aircraft and Foreign aircraft in or over Great Britain and Northern Ireland. (44) These flying conditions may be thus shortly summarised. The aircraft must be registered, certified as airworthy (45) and must carry the prescribed crew who must be licensed (46), and the prescribed instruments and documents (47). Further, if the aircraft is flying over Great Britain it must possess the nationality of a State which is a party to the Convention or with which a special Convention has been entered into, it must observe the provisions of the Order as to safety and the like, and must not land in or fly over in any prohibited area at a lower altitude than 6000 feet. (48) The Schedules annexed, which have effect as part of the Order (49) contain detailed regulations as to registration and marking of aircraft and similar matters referred to in the Order, and still further detail is to be found in the Air Navigation Directions issued from time to time.

The American Law -

Comparing the existing law in the United States of America, one finds that the Air Commerce Act, the Air Commerce Regulations, and the Uniform State Law cover much the same ground as is covered by the British Air Navigation Act and relative Orders, but the limitations of the Air Commerce Act are worthy of note. The Secretary of Commerce is charged with the duty of fostering "Air Commerce" (50) which means

(44) S.R.O.No.1508.(1923), Sec.2.

(45) do. Sec.3(1) & 3(2).

(46) S.R.O.No.1001.(1929).

(47) S.R.O.No.1260.(1925); No.1508.(1923) Sec.16.

(48) S.R.O.No.1508.(1923), Sec.4.

(49) do. Sec.6.

(50) Air Commerce Act, Sec.2.

"transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business, or navigation of aircraft from one place to another for operation in the conduct of a business." (51)

The regulatory powers of the Secretary of Commerce are accordingly very narrow in comparison with the powers of the British Secretary of State. Thus, apart from supplying aids to air navigation itself, he can only provide for granting registration to aircraft, the rating of aircraft as to their airworthiness, the periodic examination and rating of airmen, the examination and rating of aircraft facilities, and establishment of air traffic rules (52). The necessary provisions are made in the Air Commerce Regulations, and under the Air Traffic Rules are to be found several rules which differ slightly from the corresponding British rules.

For example, whereas in Great Britain flight must be at such a height over cities as to enable the aircraft to land outside in cases of emergency, in the United States flight must only be at a height sufficient to permit of a reasonably safe emergency landing, which shall in no case be less than 1000 feet" (53)

but the provisions as to low flying are not so vague as those in force in Great Britain. The minimum flying height is fixed at 500 feet "except where indispensable to an industrial flying operation," (54)

although, under the Uniform State Law, the prohibition is against flight "at such a low level as to endanger the persons on the surface beneath." (55)

- (51) Air Commerce Act, Sec.1.
 (52) do. Sec.3.
 (53) Air Commerce Regulations, Sec.82 (G)(1).
 (54) do. Sec.82 (G)(2)
 (55) Sec.9.

The provisions as to flying over sea or inland waters do not appear, but no flight under 1000 feet is to be made

"over any open-air assembly of persons, except with "the consent of the Secretary of Commerce." (56)

Acrobatic flying which, to avoid any confusion, is defined as "intentional manoeuvres not necessary to "air navigation", is dealt with in a somewhat severe manner. It is prohibited over cities, towns, or settlements, and no person may acrobatically fly an aeroplane carrying passengers for hire or reward, a regulation which might usefully be adopted in Great Britain, since there, the only safeguard in such a case is that the person in charge of the aircraft must have satisfied himself before commencing the flight that every passenger carried in an open cockpit, and the pilot, is properly secured by the prescribed safety belts. (57) Also acrobatic flying over open air assemblies of persons requires the consent of the Secretary of Commerce (58) and not merely, as in Great Britain, the consent of the promoters of the gathering. Under the Uniform State Law acrobatic flying is prohibited absolutely over open air assemblies, as it is over thickly inhabited areas.

So too there is a material difference with regard to the dropping of articles from aircraft.

Under the Air Commerce Regulations

"except when necessary to the personal safety of the "pilot, passengers, or crew, when an aircraft is in "flight the pilot shall not drop or release, or permit "any person to drop or release, any object or thing "which may endanger life or injure property." (59)

The Lincoln farmer might therefore have fared better in America for, while his egg was not presum-

(56) Sec.82(H).

(57) S.R.O.No. 712.(1934),Sec.5.

(58) Air Commerce Regulations, Sec.82.(I)(2)(b)

(59) do. Sec.82.(J).

ably "an object or thing which may endanger life
"or property", it would appear that he was in no
way liable for the offence since liability rests
with the pilot, and then only if he has permitted
the egg to be dropped. Nevertheless it must be
borne in mind that the Uniform State Law applies
concurrently in the States which have adopted it,
and under this the passenger is included for

"any aeronaut or passenger who within this
"State drops any object except loose water
"or loose sand ballast shall be guilty of a mis-
"demeanour." (60)

Lastly, there is one further offence
under the Uniform State Law which has no parallel
in Great Britain. It is this, that an aeronaut
or passenger is guilty of a misdemeanour should he
"intentionally kill or attempt to kill any birds
"or animals"

while in flight. The conditions in the United
States may justify its inclusion but it seems a
peculiarly useless provision, having regard to the
fact that so many restrictions which might have been
included are not to be found.

Taken as a whole, American aviation is
particularly free from regulations, certainly much
more so than it is in Great Britain. Time will
show which is the most satisfactory state of affairs.
In America the development of aviation has evidently
been the dominating factor. In Britain, the
characteristic of the rules and regulations is safety-
safety for the passengers and crew and for the persons
on the subjacent ground. Considering carefully these
regulations it is difficult to point to any safeguard

apter, 8.

The which is not really essential, or the observance of which will cause undue hardship to the aviator, and Chapit may be safely predicted that, rather than finding sage the British regulations, being relaxed, the future othe will see the American law gradually being assimilated solo to that prevailing in Great Britain. Then, the right to fly truly depended, in International Law, on the acceptance of the principle of freedom of the air, and in national law, on a limitation of the maxim. Now, the right to fly is a privilege accorded to the aviator by International Convention and national legislation. The character of the problem is entirely changed from that which M. Fauchille, Dr. Hasseltine, and the other early jurists considered. No longer can one debate in International Councils as to the acceptance or not of the principle of sovereignty. Rather must one accept that principle and criticise the extent to which innocent international flight is to be permitted under it - a very different proposition from that which existed when flight was first undertaken - and, in national legislatures, one must accept the view that flight is permitted and that the maxim cujus est solum does not apply, criticism now being levelled at the safeguards to be accorded to the private landowner, not as a matter of right, but by Statute. Accordingly under International Law, a consideration of the right to fly, at this stage, divides itself into three sections, the acceptance of sovereignty, the privilege of flight with the restrictions which attend it, and the resulting criticism as to the future of the right to fly. Under national law, the only

Chapter, 8.

The Right to Fly.

I have already used this title in Chapter 2, when considering the two conflicts which raged before 1914, the one on sovereignty and the other on the application of the maxim cujus est solum ejus est ad coelum usque ad inferos. Then, the right to fly truly depended, in International Law, on the acceptance of the principle of freedom of the air, and in national law, on a limitation of the maxim. Now, the right to fly is a privilege accorded to the aviator by International Convention and national legislation. The character of the problem is entirely changed from that which M. Fauchille, Dr. Hazeltine, and the other early jurists considered. No longer can one debate in International Councils as to the acceptance or not of the principle of sovereignty. Rather must one accept that principle and criticise the extent to which innocent international flight is to be permitted under it - a very different proposition from that which existed when flight was first undertaken - and, in national legislatures, one must accept the view that flight is permitted and that the maxim cujus est solum does not apply, criticism now being levelled at the safeguards to be accorded to the private landowner, not as a matter of right, but by Statute. Accordingly under International Law, a consideration of the right to fly, at this stage, divides itself into three sections, the acceptance of sovereignty, the privilege of flight with the restrictions which attend it, and the resulting criticism as to the future of the right to fly. Under national law, the only

(1) Art. 1.

(2) Art. 1.

matter left is the consideration of the new statutory provisions limiting the application of the ad coelum maxim.

The International Law - (i) Acceptance of Sovereignty.

The principle of sovereignty had been accepted as a matter of fact at the outbreak of the Great War in 1914, and, when, in 1919, the Allied and Associated Powers decided on the first Article of the Paris Convention that

"the High Contracting Parties recognise that every
"Power has complete and exclusive sovereignty over
"the airspace above its territory"

they were introducing no revolutionary doctrine.

They were merely adding to the principles of International Law one which had already been recognised.

True, it was the stress of an unprecedented world crisis which forced its recognition, but its acceptance remained. Nevertheless, the protagonists of the air freedom theory find a vulnerable spot in the armour of the principle of sovereignty when they point to the facts surrounding its acceptance, and, in the light of modern development, it is a matter of no little interest to conjecture how the scales of the old conflict would have turned eventually had the development of the law proceeded along normal lines. Under the Convention, the territory of a state over which sovereignty is exercised includes

"the national territory, both that of the mother
"country and of the colonies, and the territorial
"waters adjacent thereto." (1)

which are The text of the Havana Convention is almost identical,

"The High Contracting Parties recognise that every
"State has complete and exclusive sovereignty over
"the airspace above its territory and territorial
"waters," (2)

(3) See 6.5.1.

(1) Art.1.

(2) Art.1.

and the Spanish American Convention of 1926 embodies the provisions of the Convention of 1919. In addition, all the various bi-lateral conventions give effect to the same principle.

The national legislation invariably reiterates the principle. Thus the Preamble of the Air Navigation Act of 1920 reads

"whereas the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended over the air superincumbent on all parts of His Majesty's Dominions and the territorial waters adjacent thereto,"

the Air Commerce Act of 1926 enacts that

"Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone," (3)

and the Uniform State Law that

"sovereignty in the space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this State." (4)

A perusal of the relevant passages of the Air Commerce Act and the Uniform State Law leaves one not conversant with the American Federal structure in some doubt as to who exactly does have sovereign rights in the airspace above the United States.

What is clear, is the fact that, in any event, the United States of America accepts the principle of sovereignty which at the moment is really all that matters. Yet for the sake of clarity and a better understanding of the restrictions attending flight which are to be discussed subsequently, I may state that, while certain States still maintain the old doctrine of their sovereign rights - Hawaii and Michigan delete the reference to the granting to and

(5) Law of the Air, -----

(3) Sec.6.(a).

(4) Sec.2.

assumption by the United States of sovereignty, in their adoption of the Uniform State Law - the United States Supreme Court has repeatedly decided that Congress has almost unlimited sovereign powers under the Interstate Commerce Clause, especially with regard to air navigation. These powers are so extensive that the American Bar Association abandoned the idea of drafting an Amendment to the Constitution, which it had originally considered necessary, in favour of the Uniform State Law. Zollman (5) has summarised the position thus ,

"from the viewpoint of foreigners, the sovereignty of the airspace is vested in the United States. So far as citizens are concerned, it is vested in the individual States."

(ii) The privilege of flight and the restrictions thereon.

Sovereignty being once recognised and accepted, the second stage was to accord freedom of innocent passage to the aircraft of other States on conditions of reciprocity. Indeed, there can be no doubt that sovereignty was, and could only be accepted on this understanding. However, freedom of innocent passage depended on what may be looked upon as the third stage, namely on restrictions which were consistent with the recognition of sovereignty. Accordingly the second Article of the Paris Convention was in these terms,

"each contracting State undertakes in time of peace
"to accord freedom of innocent passage above its
"territory to the aircraft of the other contracting
"States, provided that the conditions laid down in
"the present Convention are observed.
"Regulations made by a Contracting State as to the
"admission over its territory of the aircraft of the
"other contracting States shall be applied without
"distinction of nationality."

(5) Law of the Air, p.54.

The corresponding Article of the Pan American Convention did not differ in substance. (6)

The conditions and regulations referred to in these Articles under which freedom of innocent passage is permitted are of two classes, the first being contained in the Convention itself and the second in the national legislation which followed on it.

First, as to the conditions appearing in the Convention. These are really of two classes, the limitation on freedom of innocent passage, and the conditions, strictly so called, under which such freedom of passage is permitted. Directly flowing from its sovereignty, each State was entitled to create prohibited areas and no distinction was to be made between its own national aircraft and the aircraft of other States in the prohibiting of flight over such areas. (7). That was as the Convention was signed. The Protocol of 1929 made two very vital additions. As an exceptional measure, and in the interest of public safety, national aircraft may be authorised to fly over a prohibited area, and, in exceptional circumstances, each contracting State reserves the right

"in time of peace and with immediate effect temporarily to restrict or prohibit flight over its territory or over part of its territory on condition that such restriction or prohibition shall be applicable without distinction of nationality to the aircraft of all the other States."

These two alterations in themselves materially restrict the so-called "freedom" of Article 2.

An aircraft finding itself over a prohibited

(6) Art. 4.

(7) Art. 3.

area must give the appropriate distress signal and land outside the area. (8)

The next limitation is to be found in Article 15 which has also been subject to amendment by the 1929 Protocol. Under it "every aircraft of a contracting State has the right to cross the airspace of another State without landing."

This in itself is merely a reiteration of freedom of innocent passage. The limitation is in the fact that the aircraft must, during such flight, follow the route fixed by the State over which it is flying, and it will be obliged to land if ordered to do so for "reasons of general security." If it intends to land it may be required to do so at a fixed aerodrome. In addition, the establishment of international airways may be made conditional on the consent of the States flown over, whether such airways purpose landing on their territory or not. A further, and very necessary restriction, was made by the Protocol of 1929 whereby

"no aircraft of a contracting State capable of being flown without a pilot shall except by special authorisation fly without a pilot over the territory of another contracting State,"

thus meeting the case of machines operated by wireless and under the control of robot pilots, a very modern invention, and highly dangerous from the point of view of the State flown over.

Lastly, there was the prohibition of flight by military aircraft, already noticed. (9)

Of the conditions properly so called are the following:- every aircraft engaged in international flight shall be entered on the Register of a contracting State and carry the necessary

(8) Art.4.

(9) Ante, p.141.

nationality and registration marks (10); it must be provided with a certificate of airworthiness (11); the commanding officer, pilot, and engineers and other members of the operating crew must possess the necessary licences (12); certain passenger carrying aircraft may require to possess sending and receiving wireless apparatus (13); and the requisite documents must be carried (14). In addition, there are the various prohibitions against the carriage of certain defined articles (15), and it must not be overlooked that the conditions enumerated necessarily involve the addition of the more detailed regulations relating to them contained in the Annexes.

Second, the aviator is faced with the vast accumulation of conditions and regulations imposed by the national legislatures. These again fall into two classes. The legislation of the contracting States first applied the conditions and regulations set forth in the Convention, and, in so doing, imposed no further obligations on the aviator other than those which already he had to observe. However, from what I have said, it will have been apparent that the contracting States were left considerable latitude in creating certain other conditions and limitations on the freedom of innocent passage, e.g. the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points in its territory (16) and the right to visit aircraft and verify their documents on landing or departure (17), besides the rights

(10) Arts.6-10.

(11) Art.11.

(12) Art.12.

(13) Art.14.

(14) Art.19.

(15) Arts.26-29. Ante.p.141.

(16) Art.16.

(17) Art.21.

already mentioned to fix prohibited areas, routes to be flown over and aerodromes to land at; to regulate the operation of international airways over their territory; and to prohibit the carriage of any objects it may decide upon.

Nothing is to be gained by narrating the provisions of the British Regulations giving effect to those of the Convention, or by enumerating the prohibited areas, corridors of entry, or customs aerodromes at which aircraft coming from abroad must land. So far, no reservations have been made in favour of British aircraft in connection with the carriage of persons and goods for hire between two points in its territory, and, as regards prohibited carriage, only the articles specified in the Paris Convention have been prohibited. The true spirit of the Paris Convention must be that any conditions imposed by the contracting States, if additional, must be in harmony with those which it lays down, and generally speaking it may be said that the British regulations satisfy that test. Yet, in certain respects, its provisions do appear, at first sight to go further than the Convention would warrant.

Only in minor respects does the Havana Convention differ from the Paris Convention, and, of these, two might be mentioned. Whereas the Paris Convention makes it permissible for contracting States to fix aerodromes at which the aircraft of another contracting State entering its territory, with the intention of landing, must land (18), the Havana Convention makes this obligatory.

(18) Art.15.

(19) Art.18.

(20) Art.16.

(21) Art.21.

(22) Sec.3.

"Every aircraft engaged in international traffic
"which enters the airspace of a contracting State
"with the intention of landing in said State shall
"do so in the corresponding customs aerodrome,
"except in cases mentioned in Article XIX and in
"case of force majeure which must be proved." (19)

The exceptions in Article 19 are

"postal aircraft and aircraft belonging to
"aerial transport companies regularly constituted
"and authorised,"

which may land at inland aerodromes and not at the
"port of entry".

(111) While the Paris Convention makes the
establishment of international airways conditional
on the prior authorisation of the State whose territory
it is proposed to fly over or land in (20), the
Havana Convention makes their establishment a right
under the Convention. Thus

"the aircraft of a contracting State engaged in
"international air commerce shall be permitted to
"discharge passengers and a part of its cargo at one
"of the airports designated as a port of entry of
"any other contracting State and to proceed to any
"other airport or airports in such State for the
"purpose of discharging the remaining passengers
"and portions of such cargo, and in like manner to
"take on passengers and load cargo designed for a
"foreign State or States" (21)

The Air Commerce Act was, of course, in force
for two years before the Havana Convention was signed,
and, in respect that it is not an Act giving effect
to the Convention, but rather one, the provisions of
which were given effect to in the Convention, differs
from the British Air Navigation Act. Nevertheless
it contains provision for airspace reservations
"for national defense and other governmental purposes"
(22); the entry of the aircraft of a foreign nation into
the United States on condition that such nation grants
"a similar privilege in respect of the aircraft of the
"United States" but no foreign aircraft are to engage in

(19) Art.18.
(20) Art.15.

(21) Art.21.
(22) Sec.4.

interstate or intrastate commerce (23); and power to apply the existing laws relating to foreign commerce (24). Lastly, it contains a peculiarly interesting definition of "navigable airspace" which as used in the Act means the

"airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under Section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign navigation in conformity with the requirements of the Act." (25)

(iii) The future of the right to fly -

While at the time the Convention was drawn up there was an overwhelming weight of opinion on the side of sovereignty, it must not be imagined that its acceptance has given unqualified satisfaction. Henry-Couannier considers the first Article in the Paris Convention as the "main weak spot in it" (26) and he has declared that sovereignty will be accepted for a short time only or remain a dead letter in view of the ever pressing necessity to yield to the requirements of international air navigation. The fact that the Convention was produced at a time when the trend of opinion was in favour of anything which would assure everlasting peace must be recognised, but it is not possible to gauge just to what extent Article 1 is the result of such public opinion. It may be that the normal evolution of the law would have resulted in a different Article, but, on the whole it is safe to assume that the principle of sovereignty would have triumphed eventually. Whatever may be conjectured, we must accept sovereignty as an accomplished fact, but, having done so, can

(23) Sec.6.(c).

(24) Sec.7.

(25) Sec.10.

(26) *Eléments Créateurs du Droit Aérien* (Paris 1929)
p.144.

we say that it will continue to be accepted? Will it not indeed be accepted for a short time only or become a dead letter yielding to the requirements of international air navigation? That is the question we must now consider.

Henry-Couannier visualises two distinct sets of circumstances under which the principle of sovereignty will be rejected. The first, that which would cause it to be rejected after a short trial, is obviously based on the view that its acceptance was urged as a result of the distorted opinion which held sway at the conclusion of the Great War. This is altogether an erroneous view, and, if it is the only foundation for suggesting that sovereignty will be accepted for a short time only, it can be disregarded at once. The more accurate estimate of the effect of the Great War is, I submit, that it hastened on the acceptance of a view which was gradually gaining ground, and which, sooner or later, would have been accepted. The need for national security was in itself sufficient to enforce its acceptance.

That the development of aviation will cause sovereignty ultimately to become a dead letter is perhaps a more substantial argument. In fact, should the principle be accepted only for a short time, it is in the development of international aviation that the reason for its rejection will be found. In this respect I find more substance on which to base arguments. The principle of sovereignty has now been accepted by International agreement for fifteen years, and, for the first time, its protagonists and antagonists can substantiate their views, not as the

early jurists on legal theory, but on the actual working of an international legal system under which States are recognised to have sovereign rights in the atmosphere above their respective territories. The future of the principle of sovereignty, therefore, depends on the successful working of this system and the answer to the question whether sovereignty will yield to the requirements of International air navigation is simply this - has the Paris Convention stood the test of practical operation?

In itself. Like all other Conventions, it has its critics, and some, such as Henry-Couannier, advocate its complete rejection on the ground that the acceptance of sovereignty is contrary to the whole spirit of the development of flight. The majority of its critics, however, do not find fault with its acceptance of sovereignty. Rather do they find objection in the conditions imposed on "innocent" flight, conditions which they maintain are repugnant to the very idea of freedom of flight. Those conditions, we have already seen, are of two kinds, the first, contained in the Convention, and the second, those which, within limits, the contracting States were allowed to impose. Altogether, these conditions, were they the maximum which could be imposed, severely limit commercial and private aviation, and there are many very sound reasons why they should be considerably relaxed. They are not, however, all that have been imposed.

In Great Britain there is the prohibition against a person being in or even entering an aircraft while in a state of intoxication. This is a very

found, and we are forced to examine its provisions

laudable provision and may not cause any undue hardship to the aircraft of other contracting States although it may not be appreciated by them. That is not the point. The fact remains that it is not a condition appearing in the Convention and it does not seem to be authorised under any of the Articles which leave the contracting States free to impose conditions. If that is so, on what authority can Great Britain be justified in subjecting the aircraft of other contracting States to such a condition? In itself, it is a regulation of minor importance, but it is an example of a type of restriction imposed over and above those already envisaged by the Paris Convention, a type which is beginning to operate as a very severe handicap on commercial and private aviation.

The attention of the I.C.A.N. has recently been called to the position, since in several countries, before a flight in their airspace by the aircraft of another country is permitted, prior notification must be given of such intention. In some cases even, prior authorisation must be obtained and Roumania has asked for the opinion of the Commission on the following question,

"si, par une large interprétation de l'article 2, second paragraphe, un Etat contractant pourrait prendre une disposition par laquelle il subordonnerait le survol des aéronefs ressortissant aux autres Etats contractant, à une autorisation qui devrait être obtenue préalablement pour chaque aéronef à part, même si l'obtention de cette autorisation n'était subordonnée qu'à une simple formalité comme, par exemple, de communiquer à la légation de l'état que l'on veut survoler, les dates et caractéristiques de l'aéronef, les noms du personnel de bord et des passagers, la date et le séjour probable du survol, les noms des aéroports sur lesquels on a l'intention d'atterrir et le but du voyage."

Adopting In the Convention no direct answer can be found, and we are forced to examine its provisions

as a whole to find the answer - in particular, Articles 1, 2 and 15.

The first Article lays down the principle of sovereignty, and in the second, this is followed up by the declaration by which contracting States undertake to accord freedom of innocent passage provided the provisions laid down in the declaration are complied with, adding

"Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality."

To declare that States have complete and exclusive sovereignty in the airspace above their territory taken by itself, means one thing only, that a State is free to impose whatever conditions it may desire.

That being so

"the regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States",

which regulations must be applied without distinction of nationality, must mean that a State has a free hand to impose any conditions it may consider essential, and that, in addition to imposing those laid down in the Convention. Indeed, to carry the argument to its logical conclusion, a State need not, in these circumstances, even impose the conditions laid down in the Convention. Further it means that in the Convention

"no right of innocent passage is averred or recognised"

and that

"Article 15 in declaring the right of foreign aircraft to cross the airspace of another State merely makes trans-state flight by foreign aircraft legal." (27)

Adopting that view, the question submitted by

Roumania would be answered in the affirmative, but, I think wrongly so.

The other side of the argument is that the real principle laid down in the Convention is to be found in Article 2, i.e. freedom of innocent passage, and that the second paragraph thereof must be regarded in that light. The Convention lays down the full extent of the restrictions to be imposed on innocent flight and the answer to the Roumanian enquiry is accordingly in the negative.

That such is the sound answer I do not doubt, but the line of reasoning is not to be found in either of those extremes. The Convention accepts sovereignty and it must be interpreted in that light. To that extent States can do what they like in their own atmosphere in the direction of closing it to air navigation in the "exceptional" "circumstances" allowed for in Article 3, paragraph 3, but, so long as it is not closed, they accord the right, in the sense of "privilege" of innocent passage under Article 2. They do not accord a similar right to land, only to fly over their territory. Article 15 is a mere repetition of Article 2 for the purpose of declaring the limitations which are to apply to that privilege granted by the latter. This right of freedom of innocent passage is a contractual one and its character in that respect must not be forgotten. The purpose of the Convention was to enable innocent or "inoffensive" international flight to be carried on between States which had already recognised the doctrine of sovereignty. The draughtsmen of commercial contracts are careful to embody in the deed of contract the

full extent of the conditions to be observed by, and the restrictions to be put on each of the contracting parties. The terms of the contract are reduced to writing for the very purpose of ensuring that the parties know where they stand and will not at a later date be subjected to additional conditions and hardships. Why should an International Contract be regarded otherwise? The Paris Convention enabled commercial and private aviation to be indulged in on the conditions and restrictions to which it gave effect and on these only. It was not the intention of those who drew it up that further conditions and limitations should be added at the pleasure of each and every State, for then the Convention would have served no useful purpose. It was their intention that no greater restrictions should be put by contracting States on the aircraft of other contracting States than were imposed on their own nationals. Hence the insertion of the second paragraph of Article 2, which is no more than a declaration of equality of treatment. To read into it the meaning that it enables contracting States to impose unlimited restrictions on international flight is to give it a meaning without reason or common sense.

It would therefore seem that the Legal Sub-Commission of the I.C.A.N. has given the only possible answer to the question submitted to it by deciding that no rule to the effect that a contracting State makes conditional on a special and prior authorisation flight over its territory by the aircraft of the other contracting States could be laid down by virtue of the second paragraph of

Article 2 and the first paragraph of Article 15, even if the issue of the authorisation in question is dependent only on a simple formality consisting for example, of communicating before the flight, to the diplomatic or consular authorities of the country flown over, information with regard to the aircraft, crew, cargo, and, in general, with regard to the journey the said aircraft desires to make.

It must always be remembered, of course, that the official decision of the I.C.A.N. is by no means binding. Such a decision could only come from the Permanent Court of International Justice, or, as the result of an Arbitration, since the matter is one of interpretation which is regulated by Article 37 of the Convention, but it is difficult to see how the Permanent Court could differ.

Having taken the view that conditions, other than those appearing in the Convention or expressly authorised by it, are ultra vires and illegal in the sense that they constitute a breach of the Convention I have disposed of the first class of critics. Their objections being upheld by the I.C.A.N., that organisation must now address itself to finding the remedy. The next criticism is levelled at the conditions which are permitted, and emanates principally from those persons who are interested in the commercial side of aviation. Their whole grievance can best be gleaned from the Reports of the International Chamber of Commerce, which body is sufficiently representative of their interests. It is Article 15 of the Convention to which objection is

taken, but, on this occasion, the concluding paragraph, which, as amended by the 1929 Protocol now reads "every contracting State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines with or without landing on its territory."

It must be clearly distinguished from the point raised by Roumania which dealt with a prior authorisation being obtained for flight by private aircraft. Regular international air lines are compelled by Article 15 to obtain the consent of the States to be flown over before commencing operations.

A provision such as this gives Henry Couannier just cause to lament the acceptance of sovereignty. It is a provision which can, and has been used to hamper materially the development of aviation. There may be some justification for making conditional on prior authorisation the landing of a regular air line in an intermediate country. There can be none for making cross country flying without landing conditional on such prior permission. It tends to tie up the whole international commercial aviation and Great Britain felt the effect very considerably when, on failing to obtain the necessary authority, her Imperial air lines were forced to make wide detours, with the result that valuable time is lost and the cost of transportation increased.

Has the Paris Convention in so far as it contains the acceptance of sovereignty stood the test of practical operation? Put in another way has the result of its operation been such that a declaration of freedom of the air rather than of sovereignty is now demanded? Once again we are faced with the question. The need for national security is as imperative to-day as it was in 1919, and, from that point of

view, the time is not yet ripe to reverse the order of things, and declare freedom of the air space. The International Law Association at its Meeting in Vienna in 1926 went so far as to recommend that the principle of air sovereignty contained in the Paris Convention should be embodied in any International radio convention, and the fourth Congrès International de la navigation Aérienne, meeting in Rome in 1927 confirmed the principle of sovereignty and resolved

"que chaque Etat a le droit soit d'interdire certaines zones à la navigation, soit d'indiquer les routes d'entrée, de traversée et de sortie." (28)

The tendency of these not unimportant resolutions, therefore, is towards enlarging rather than minimising the exercise of sovereign rights.

However, full cognisance must be given to the defects which have become apparent in the Convention, especially in Article 15, the working of which has caused hardship in practice. But the remedy is to be found rather in extending the privilege of freedom of innocent flight introduced by the Convention than in reversing the principle on which it is based. Great Britain, one of the strongest protagonists of sovereignty in 1919, was, by 1929, at the Conference called to consider the amendments required in the text of the Convention, urging a greater right of flight, a choice of routes, and a more liberal interpretation of Article 15. The same note was struck by the International Law Association at its New York Conference in 1930 when it urged that all States should co-operate in bringing about a comprehensive international agreement.

(28) R.A.I., No.1.p.37.

(29) R.A.I., No.8. p.277.

ment for the control and conduct of air navigation and that each contracting party should undertake in time of peace to accord freedom of innocent passage above its territory to private aircraft of other contracting parties provided that the conditions laid down by the Convention were complied with. Lastly, the International Chamber of Commerce, at its Conference held in Vienna during May and June 1933, after having the benefit of several exhaustive Reports from its Committee on Air Transport and from individual members, passed a comprehensive resolution, on the narrative that freedom of passage constituted a necessary element in the development and progress of international air navigation services, to the effect

"(a) that the formation of international air lines should be free and that it should not in future be dependent upon obtaining previous sanction from the State flown over; that in consequence Article 15 of the Convention of 1919 be amended to that effect; (b) that at least until Article 15 of the Convention of 1919 has been amended, the right to make the formation of international lines dependent upon the previous sanction of the State flown over should only be exercised exceptionally." (29)

Such was the recommendation of the representatives of thirty five States and fifty five International organisations. It cannot be regarded lightly. The conclusion, therefore, must be that the Paris Convention needs no radical alteration. Rather does it require a more liberal interpretation, even amendment, to make freedom of innocent passage a reality instead of a mere pretence as at present. There is no reason to believe that the future will see sovereignty becoming a dead letter. The conflict is surely ended, and sovereignty has triumphed.

The National Law - judicial interpretation in time

to come. The present position of the maxim cujus est solum ejus est ad coelum usque ad inferos may now be shortly stated. Whereas, in International flight, the sovereignty of States in the airspace above their territories to an unlimited extent was recognised and flight was thereafter permitted, in the national law, the position was reversed. The unrestricted right of flight is first recognised and the rights of the landowner in the airspace above his property ad coelum have been reduced to the minimum consistent with safety to his person and property.

The Air Navigation Act makes this assertion in unqualified terms -

"No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder, and of the Convention, are duly complied with." (30)

The effect of this section is to link trespass and nuisance together so far as concerns aviation, and, at first sight, is to lay to rest any question as to the application of the maxim, but that is so only to a limited extent. It only applies to aircraft which have complied with all the provisions of the Act, no matter how trivial, and to aircraft covered by the Act or relative Orders. In any other case the immunity could not be invoked and presumably the success of an action for trespass or nuisance would in such cases depend on the effect of the maxim at common law. The meaning of a height which is reasonable in the circumstances will in all probability

(31) Section, 5.

(30) Sec.9(1).

be the subject of judicial interpretation in time to come.

The British Act proceeds on the assumption that if a landowner does not have complete ownership of the airspace above his property there is sufficient doubt to necessitate Statutory enactment. In the United States of America it has been considered advisable to insert in the Uniform State Law a provision that every landowner does own the airspace above his property,

"the ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath subject to the right of flight described in Section 4." (31)

In at least one State, the proviso as to the right of flight is not inserted. The fourth Section referred to states that

"flight in aircraft over the lands and waters of this State is lawful unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be immediately dangerous to persons or property lawfully on the land or water beneath."

The provisions of the Uniform State Law have much to recommend them and are perhaps better than the provisions of the Air Navigation Act. They are clearer and more concise and are not likely to give rise to such difficulty of interpretation as the British Act which has caused an unnecessary complication by coupling in one Section the trespass and nuisance provisions with those relating to damage caused to third parties on the surface. There is no real necessity to make the harsh enactment as to the conditions of the Act being complied with - a provision which is more applicable to the second part

of the Section than to the first.- If this is to remain, then a declaration along the lines of the third Section of the Uniform State Law would have prevented a lengthy discussion as to the application of the maxim cujus est solum which must arise in any action of trespass against a party who has failed to comply with the provisions of the Act, or of the Orders made thereunder, or of the Convention.

The British Law has not thought it necessary to make any reference to the entry of aircraft on the landowner's property. There can be no doubt that this would constitute a trespass and be illegal but the Uniform State Law has declared that "the landing of an aircraft on the lands or waters of another, without his consent is unlawful, except in the case of a forced landing."

This would not be the position under the English Law since an aviator making even a forced landing would be guilty of trespass.

Whatever may be the law, it is desirable that, so far as possible, it should be uniform, and that each State should adopt the same principle in dealing with trespass and nuisance. The International Law Association affirmed this necessity at its meetings at the Hague in 1921, and again at Stockholm in 1924, and suggested that no action should lie for trespass by reason purely and solely of the flight of any aircraft over any property at a reasonable height, to be fixed by Convention. The main difficulty would be in determining what height to be agreed upon, but the most feasible solution would be to leave it at a "reasonable height", "reasonable" being interpreted much on the lines of the fourth Section of the Uniform State Law.

Damage caused by Aircraft to Third Parties on the Surface.

The Paris Convention takes steps to prevent damage by providing that every aircraft engaged in international flight shall be provided with a Certificate of Airworthiness (1) and that the commanding officer, pilots, engineers and other members of the operating crew shall be provided with Certificates of Competency and Licences issued or rendered valid by the State whose nationality the aircraft possesses. (2) The Certificates issued by one contracting State in accordance with the regulations laid down in the Convention shall be

recognised as valid by the other contracting States. (3)
The Havana Convention has similar requirements. (4)
The old controversy has thus been settled by the
adoption of the dual system consisting of certification
both of machine and of personnel, the only course to
adopt.

The requirements necessary before an aircraft is certified as airworthy or a pilot as

- (1) Art.11. (3) Art.13.
(2) Art.13. (4) Arts. 12-14.

competent are in a high degree technical. They are to be found in the Annexes to the Convention (5) and in the Schedules annexed to the British Orders in Council (6). They are subject to continual alteration as aviation develops but their object is to ensure that, as far as human foresight can make it possible, an accident will not be the result of a faulty machine or incompetent pilot, and the standards set in each case are consistently high. In addition, in Great Britain, safety is further ensured by providing for the periodical overhaul and inspection, and even detention of passenger or goods carrying aircraft which the Secretary of State has reason to believe are in a condition unfit for flight, and the examination before every flight of aircraft carrying passengers or goods for hire or reward. Although there are repeated protests that those regulations are hampering the development of aviation, they are being used to good effect, for, of the accidents investigated by the Air Ministry since the Regulations were enforced, only a very small percentage were traced to defective aircraft.

Once damage has been occasioned, the liability therefor is now regulated in Great Britain by the Air Navigation Act,

"where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss without proof of negligence or intention or other cause of action as though the same had been caused by his wilful act, neglect or default except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered." (7)

(5) Annexes B. and E.

(6) Schedules 2 & 5. S.R.O.No.1508.(1923).

(7) Sec.9.

The Section further provides that where damages recovered from and paid by the owner arose from the action of another person or servant, application may be made to join such person as defendant, or, if not, the owner may take separate action against such person. Where the aircraft is bona fide demised, let, or hired out, references to the Owner under the Section shall refer to the person to whom the aircraft has been demised, let, or hired out.

What is the effect of this section and what principle of liability does it introduce? Prof. M'Nair maintains that the principle of absolute liability is introduced (8). Wingfield and Sparkes (9), and Holdsworth (10) on the other hand consider that it merely introduces a presumption of negligence against the owner of the aircraft. However, since the Section proceeds on the Report of the Civil Aerial Transport Committee, and, in view of the terms of that Report (11), it would be more accurate to say that it combines the maxim res ipsa loquitur and the Rule in Rylands v Fletcher. Yet, the recent Report of the Committee on the Control of Private Flying and other Civil Aviation Questions is quite definite that the Section imposes absolute liability for material damage or loss caused to any person or property on land or water. (12)

(8) Law of the Air, p.68.

(9) Law in relation to Aircraft, p.14.

(10) Law of Transport, p.147.

(11) Ante, p.120.

(12) C md. 4654 (1934). p.49.

Damage caused "in flight", taking off, or "landing" may not be easily defined. "Taking off or landing" is presumably intended to cover the whole movements of the aircraft from the time when the propellor is set in motion with the intention of "taking off" to the time when the engine is stopped on the completion of the flight. The Section was considered in the English Case of Cubitt v Gower, decided in the Kings Bench Division in October 1933 but not reported. There, the plaintiff had taxied his aeroplane out into the aerodrome, and, while it was stationary awaiting a passenger, it was run into by the defendant's aeroplane which was taxi-ing prior to a "take off". The plea that the plaintiff had caused or contributed to the accident was repelled and a decision was given in his favour without his having to prove negligence. The facts of the case clearly fell within the category of damage caused by an aircraft "taking off", but, assuming that the defendant's aeroplane had been taxi-ing from one side of the aerodrome to the other, not at the conclusion of a flight and with no intention of "taking off", the position would have been entirely different. It seems inevitable that in such circumstances the Plaintiff would have required to prove negligence on the part of the defendant, and, had the collision been the result, say of a violent gust of wind causing the defendant's aircraft to swing round, he would not have

succeeded. Had the defendant been taxi-ing prior to a take off this latter defence would have been of no avail.

It would also appear that before liability under the Section can be applied, the damage or loss caused must be "material". This leaves a very wide latitude to the Courts, and, in a way, will cause considerable hardship. Before an injured party can succeed he has to show that his damage or loss is "material", and the result must be that in those cases where the loss or damage is slight - probably the more numerous cases - he will be under the burden of proving negligence.

It is evident, therefore, that there are still cases in which recourse will require to be had to the principles of the common law in deciding the liability for damage caused by aircraft. Apart from the cases mentioned, the Act would not apply to "aircraft belonging to or exclusively employed "in the service of His Majesty" (13)

or to aircraft which do not possess the nationality of a State party to the Paris Convention or to a special Convention and which did not hold a special and temporary authorisation.

The effect of a contravention of any of the provisions of the principal Act or

(13) Air Navigation Act, Sec.18(1).

(14) (1923) 2 K.B. 841.

Orders made thereunder in questions of civil liability has also been raised. In other words, if the injured person is debarred from pleading the Act and is also unable to prove negligence, can he claim damages on the ground of a contravention of the Act or Order? In England the breach of a statutory rule is prima facie evidence of negligence but the statutory enactment is not the exact measure of an individual's duty. The leading case is Philips v Britannia Laundry (14) where a wheel came off a lorry going along a road and damaged the plaintiff's van. The plaintiff could not prove negligence but founded his claim on a Statutory Regulation whereby a penalty of £10 was imposed for failure to keep a motor car and its fittings in such a condition that they would not be in a position to cause damage to persons using the road. On the assumption that it was unlikely that the legislature intended to impose an absolute duty, the Court held against the plaintiff, and, if this is the law, the person suffering loss and damage as a result of articles falling or being dropped from an aircraft could not found on a contravention of Section 9 of the Air Navigation but would require to prove his case in the ordinary way.

(14) (1923) 2 K.B. 841.

(15) See. 4.

out for a p The Uniform State Law provides that

"the owner of every aircraft which is operated
"over the lands and waters of this State
"is absolutely liable for injuries to persons
"and property on the land or water beneath,
"caused by the ascent, descent, or flight
"of the aircraft, or the dropping or falling
"of any object therefrom, whether such owner
"was negligent or not, unless the injury is
"caused in whole or in part by the negligence
"of the person injured or of the owner or
"bailee of the property injured." (15)

Like the rest of law, the section only applies
to aircraft designed to manoeuvre on land, sea-
planes and flying boats being expressly
excluded, and parachutes do not appear to fall
within its scope. The section is more concise
than the British Act in respect that it clearly
states that absolute liability is to be the
rule and all injuries to persons or property
are covered. Whether "ascent" and "descent"
are capable of such a wide interpretation as
"taking off" and "landing" is to be doubted and
it could be that "ascent" and "descent" would
not cover the period of taxi-ing, on the ground,
being limited to the actual ascent and descent
while in flight. It is also specially
provided that the owner or lessee will be
liable for damages caused by a forced landing,
for which he is not liable under trespass,
as provided by Section 5. (16)

In Great Britain, where an aircraft
has been bona fide demised, let, or hired

not definitely ascertained but it appears that
when anything is thrown from an aircraft,

(15) Sec.5. of absolute liability is

(16) Sec.4.

applied, whereas if anything falls from it

out for a period exceeding fourteen days, the person to whom it is so demised, let, or hired out comes in place of the owner in questions of liability for damages. Under the Uniform State Law, on the other hand, both owner and lessee are liable and may be sued jointly or either or both of them may be sued separately. The liability of an aviator who is not the owner or lessee is limited to the consequences of his own negligence.

From what I have just said, it will be seen that an aviator would be subjected to different principles of liability according to whether he was flying over Great Britain or the United States. Indeed, he would be subjected to different principles of liability as he flew over America from one State to another, for only seventeen States apply the Uniform State Law, two have special laws, and the remainder apply the common law. International flight over the various countries in Europe is subject to the same difficulty and a cursory examination of the laws operating in some of the European countries will serve to show the difficulty with which an aviator is faced.

In Italy, the state of the law is not definitely ascertained but it appears that when anything is thrown from an aircraft, the principle of absolute liability is applied, whereas if anything falls from it

the defence of force majeure could be pleaded. In all other cases the common law rules apply. The owner and commander of the aircraft are jointly liable with the author of the damage and in certain circumstances where the owner incurs liability without, in fact, having caused the damage, he is freed from payment of any further damages should he elect to hand over the aircraft to the injured person.

In France the law is similar to that in force in Great Britain except that the defence of contributory negligence is only open if the accident causing the damage occurs at an aerodrome. It has been decided that liability begins from the moment the propellor is started. The person liable is the "operator" of the aircraft, and the weight of opinion is in favour of defining "operator" as the person who is benefiting materially by the use of the aircraft, although in another section of the law it is provided that the owner and hirer are jointly responsible unless the hirer is entered on the Register; a provision which is quite without reason if the "operator" is to be taken as the person who is benefiting by the using of the aircraft. That is, unless one holds that the owner who has hired an aircraft is also "benefiting materially" by its use, an interpretation which is quite feasible.

The Polish Law presumes that when an accident occurs there was fault on the part of the owner of the aircraft and also that such fault on his part was the direct cause of the accident. The

legal systems on this all important question of

liability for damage is of great interest to the owner is the person responsible unless in the case of hire, where the hirer is registered as such in the Register of Aircraft, and also in the case of theft. The Aviation Law only applies to damage caused by "accident" and any action caused by other means, for example by normal flight, must be brought under the Civil Law and negligence proved. The owner will be liable for the fault of the pilot or other officer acting on his behalf. It has been decided that under the Aviation Law, the responsibility of the owner begins the moment the aircraft is under the control of one of the forces necessary to support or propel it in the air.

Lastly there is the German system, which is strictly limited in its application. The underlying principle of the Air Navigation Law is that a person who puts in circulation a dangerous object is responsible for any damage caused by his so doing, and there can be no excuse, but the law is only applied within certain narrowly defined limits. There must be injury to the life or health of persons, or damage and destruction of things, and such injury or damage must result from an accident which occurred during the "operating" of the aircraft, that is, when it was under the action of the motive forces necessary to suspend or propel it in the air. The person responsible is he who defrays the cost of the aircraft's maintenance, uses it, and thereby makes a material gain. The defence of contributory negligence can be pleaded but only to a very limited extent.

While a comparative study of the various legal systems on this all important question of

liability for damage is of great interest to the lawyer, it is not so to the aviator, for the fact emerges that he has no idea what is to be his liability should he be involved in an accident which caused damage to persons or property on the surface below. If there is any branch of the law which cried aloud for some measure of uniformity of principle, it is this, and at its Conferences at the Hague and later at Stockholm in 1924, the International Law Association resolved, on the narrative that the various laws relating to damages should be uniform, that in the event of any loss or damage whatsoever to persons or property on land or water caused by aircraft, the owner and charterer should be jointly and severally liable, without proof of negligence, for such loss or damage, provided that the damage or loss was not caused or contributed to by the negligence of the person by whom the same was suffered. The aircraft alleged to be responsible for the damage or loss should be subject to immediate arrest and detention until such security had been given as might be required by the Court. However, it has fallen to the International Conferences of Private Aerial Law to produce a Convention for the purpose of unification of the law. This Convention, which was really the work of the offspring of the Conferences, the Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.), was finally approved at the Third Conference held at Rome in May 1933. The purpose of the Convention was the unification "de certaines règles relatives aux dommages causés par les aéronefs aux tiers à la surface,"

is the party against whom damages must be claimed (Art. 4)

and was a combination of two questions dealt with by the C.I.T.E.J.A. - the liability for damage, and the security to be furnished by an operator of an aircraft for such damage. In other words, not only was liability considered, but also indemnification, the third aspect of damage. It is important to bear in mind that the Convention is only intended to apply to damage caused by aircraft of one contracting State flying over the territory of another contracting State (Art.20), and, as a result, does not purport to regulate damage caused by national aircraft of a contracting State while in flight over their own national territory.

(i) The liability imposed -

Under the Convention, which has been signed by twenty States, including Great Britain, a person who suffers loss or damage as a result of the flight of aircraft has a right to reparation provided he shows, first, the damage, and, second, that the aircraft caused it. Included under this is the damage caused by articles falling from aircraft, or caused by any person on board, unless in the case of an intentional act done by a stranger to the aircraft outwith the operation thereof, and without the operator or his officers being able to prevent it. An aircraft is in flight from the commencement of rising operations to the conclusion of landing operations (Art.1). Contributory negligence is pleadable as a defence (Art.2).

(ii) The persons liable -

The operator of the aircraft - he who has it at his disposal and uses it for his own account - is the party against whom damages must be claimed (Art.4)

although he himself has recourse against the author of the damage (Art.7). When the name of the operator is not officially disclosed, the owner is liable until the contrary is proved. If he has taken reasonable steps to prevent it, the operator is not liable for damages caused by a person operating the aircraft without his consent (Art.5), and where the damage is the result of a collision between two or more aircraft, the operators are jointly liable (Art.6)

(iii) The prosecution of the claim -

The action may be raised in the Courts of the defender's domicile or in the Courts of the county where the damage was occasioned (Art.16), thus applying the rules of private International law presently applicable. Claims must be enforced, or, at least, notified, within six months of the date of the accident (Art.10), and actions prescribe within a year unless in the case where the pursuer shows that he had no knowledge of the identity of the defender, in which case the time limit runs from the date on which he became aware of the identity. In any event actions prescribe in three years (Art.17).

At this point it may be convenient to revert for a moment to the German Air Navigation Law. The Law is dated 1st August 1922 and Section 23 thereof limits the liability of the operator in the case of death or wounding of persons to 25.000 marks of capital or 1.500 marks of annual income, and if several persons are injured, the cumulative amount claimable between them must not exceed 75.000 marks of capital or 4.500 marks of annual income. In the case of things destroyed, the liability is limited to 5.000 marks. As a counter part to this limited

liability, the holder must show that he has effected an insurance for the maximum sum indicated, or has furnished a Bank security. The Insurance Company must be authorised in the Reich and the Policy must be in such terms that it will remain in force in the case of a change of holder during the whole duration of the Insurance contract. The necessity for this Insurance is such that the aircraft will not be registered until the authorities are satisfied as to the existence of the Insurance.

The significance of this digression on the German Law will be apparent. To begin with it brings us to the third aspect, that of the indemnification of damage, and, since the system has been in operation from a fairly early date and does not seem to have given rise to any very great agitation for its alteration, it is not surprising to find that it is followed closely in the Convention drawn up by the C.I.T.E.J.A. The Convention must not be regarded as a pioneer effort. Under it, the operator is liable in damages for each accident to the extent of 250 francs per kilogram of weight of the aircraft, within the limits of 600.000 francs minimum and 2.000.000 francs maximum. Of the sum found due, one third is apportioned to damage to property and the remaining two thirds to persons, subject to the maximum of 200.000 francs for each person (Art.8). Where several persons are injured, and the total sum payable exceeds the limits, each sum is reduced proportionally to a sum which will not exceed the limit (Art.9). In addition, where different parties sue in different Courts, the defender can state before each his total

claims to be met by him so that the maximum limit of his liability may not be exceeded (Art.11).

Following the German Law, the counter part of this is an obligation to effect an insurance to the extent of the liabilities under the Convention, (Art.12). As an alternative to this Insurance there may be a cash deposit in a public treasury or authorised Bank, or a guarantee given by an authorised Bank. The nature, extent, and duration of the sureties must be stated officially by certificate, or on one of the documents carried, and this proves the position of the aircraft with regard to its obligations under the Convention, (Art.13).

This insurance, or the alternative, must be effected before flying over the territory of the other contracting States (Art.12) and, incidentally, will raise another question. As we have seen the Paris Convention, Article 2, second paragraph, lays on a State the burden of applying equality of treatment as to the conditions to be imposed on aircraft flying over its territory, and, if the States parties to that Convention are identical with those parties to the Rome Convention, no difficulty will arise. But what if this is not the case and some of the States parties to the former do not ratify the latter? It would mean that some States were subjected to a system of compulsory insurance while others were not. This provided an additional argument against the view that the equality of treatment mentioned in Article 2 of the Paris Convention is to be the means of introducing additional conditions, for, if this was so, then States which had not ratified the Rome Convention might nevertheless find that before engaging in

International flight, their national aircraft would require to be covered by insurance to the extent of the liability under that Convention.

The last provision of the Rome Convention to which I desire to draw attention is that contained in Article 14. Under this Article, the operator cannot avail himself of the provisions limiting his liability, first, if it is proved that the damage is the result of gross negligence or fraud on the part of the operator or his officers, unless he shows that the damage arose from a fault of pilotage or navigation, or if caused by his officers that he took all useful measures to prevent it, and, second, if he does not furnish security or furnishes insufficient security.

To date, the Rome Convention has not received the necessary five ratifications to enable it to come into force, and it is in connection with this latter Article that the hitch occurs. There is unanimity of opinion on three points, viz:- that the liability to be imposed on the aviator should be absolute, subject to the defence of contributory negligence; that his liability should be limited and known beforehand; and that there should be some system of compulsory third party insurance. It is really immaterial on whom liability is held to rest if a system of compulsory insurance is accepted.

Once more we are faced with the difficulty in reconciling the conflicting interests of the development of aviation and the security to third parties..

If we regard the security of third parties as the predominant interest, the question reduces itself into how that is to be

effected with the least impediment to the development of aviation, and it is in this spirit that we find the International Congress in 1927 recommending compulsory third party insurance and a system of limitation of liability, which

"tout en conciliant les intérêts opposés ne soit pas un empêchement au développement de la navigation aérienne." (17)

Now, perhaps, the greatest loophole in the system which has been evolved is the fact that a person may elude any system of insurance and the injured person finds himself without recourse. This has happened under

the German system. It will happen under the Convention. It is not enough to say, as in Article 14

that the liability is unlimited in the case of gross negligence for it is to be presumed that the insurance would then be ineffectual; it is more pointless to make it unlimited when an insurance has not been effected, for it means that where the liability is unlimited the injured person has less chance of recovering anything. It is for this reason that the

International Air Traffic Association has suggested to the C.I.T.E.J.A. that it should consider Article

14 in more detail. Until it is made clear precisely what is to be covered by the insurance the

Convention will not be ratified. Several States have taken the view that the insurance to be effected must cover any unlimited claim under the first part of Article 14, and, before it is ratified, it should be provided that, even if liability is unlimited as falling under the Article, the injured party is covered by insurance to the extent of the limits

(17) RA.I., No.1. p.35.

(18) Cmd.4654.(1934).p.58.

(19) Sec.5.

under Article 12.

"Third party insurance to be satisfactory from the public standpoint must be both comprehensive and complete. It must give the third party protection irrespective of the omissions or misrepresentations of any individual or the financial shortcomings of the insurer. Briefly, the policy of insurance must be incontestable and indisputable on any grounds so far as repudiation might affect an injured third party." (18)

This, the statement of the Committee recommending the introduction of a system of compulsory insurance in Great Britain, sets forth admirably the ideals to be looked for in such a system. The Air Ministry has accepted the recommendation, and only legislation is awaited to put the system into operation.

One concluding observation falls to be made. Aircraft may in some countries be seized in security for damage which they have occasioned. For example, under the Uniform States Law, the injured person, or owner or bailee of the injured property, has a lien on the aircraft causing the injury to the extent of the damage caused by it, or by objects falling from it. (19)

At the Rome Conference on Private Aviation Law a Convention was also signed to regulate this matter. The provisions of the Convention were to apply to seizure in security, which is any act, whatever it might be called, whereby an aircraft is seized in the interest of a private individual by the intervention of agents of the law or the public administration for the benefit of a creditor or proprietor, where the seizure is effected without a judgment perviously obtained in the usual manner or some equivalent title for execution. In cases where a creditor has a right by law to detain an aircraft

(18) Cmd.4654.(1934).p.52.

(19) Sec.5.

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without the consent of the operator thereof, such detention is to be regarded as seizure in security for the purposes of the Convention. The acts envisaged would be, for example, the Scottish procedure of arrestment ^{on} the dependence of an action.

The effect of these acts of seizure has been to cause serious hardship in many cases where an aircraft has been detained. The matter has been considered by the International Law Association, the International Chamber of Commerce, and the International Air Traffic Association, with a view to exempting certain classes of aircraft from such seizure, and, in the case of other aircraft, for ensuring their speedy release on furnishing sufficient securities. If the Convention is given effect to, there would be exempted from seizure in security, aircraft used exclusively in the service of the State, including postal aircraft, but excluding commercial aircraft, aircraft used in a regular air transport service with the necessary reserve aircraft, and every other aircraft used for the carriage of goods or persons for reward when it is ready to start on such a journey, unless in the case of seizure for a debt incurred for the journey it is about to make, or incurred during the journey, (Art.3). In cases where seizure is permitted, the aircraft will be released as speedily as possible on security being found for the debt or damages claimed, or, for the value of the aircraft, if it is the lesser amount. These provisions would not apply to aircraft seized in Bankruptcy proceedings, or for breaches of customs, penal, and police regulations, (Art.7).

If there is in force an International

system of compulsory third party insurance, there would appear to be no reason why, when the fact of the insurance has been verified, an aircraft which has been seized in security for damage caused by it should not be released and allowed to proceed on its journey. The International Air Traffic Association has recommended the C.I.T.E.J.A. to consider inserting such a condition in any supplementary Convention to the Rome Convention, and the Fédération Aéronautique Internationale made a somewhat similar suggestion at its Conference at Paris in 1932.

Chapter, 10.

Carriage by Air.

On the subject of carriage by air, it had been felt that the existing rules concerning carriage by land and by sea could be adapted without much difficulty, and, no doubt due to this, it has been possible to agree on a fairly comprehensive Code of regulations governing International air carriage.

The Paris Convention dealt with carriage in two Articles, by providing that each contracting State should have the right to establish reservations and restrictions in favour of its own national aircraft in connection with the carriage of persons and "goods for hire" between two points in its territory, (Art, 16), and, that if it did impose such reservations and restrictions, it might be subjected to similar reservations and restrictions in any other contracting State, even although the latter State did not itself impose the reservations and restrictions on other foreign aircraft, (Art 17).

Arising out of the text of these Articles, two questions arise.

In the first place, the words "two points" "in its territory" have been interpreted in different ways by different States. They must be considered in the light of Article 1, under which the territory of a State is to be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto, and Article 40, under which, as amended, the territories of Protectorates or of territories administered in the name of the League of Nations, are for the purposes of the Convention, and Dominions, taken separately, thus excluding all

to be assimilated to the territory of the Protecting or Mandatory States. The result has been that some States have made reservations and restrictions in the favour of its national aircraft in connection with carriage between "two points in its territory" which are separated by many thousands of miles, and sometimes by many intervening States. The I.C.A.N. has endeavoured to restrict the conception of air cabotage under Article 16 but has found it impossible to do so owing to the diversity of the opinions submitted to it by the Governments of the contracting States. It has, therefore, had to be satisfied with recommending these States not to invoke Article 16 of the Convention in the case of carriage between two points geographically far apart, both belonging to their territory, when the two points nearest together of these two regions could not be connected normally by a flight without intermediate landing. This would give greater freedom to air transport services, and while the solution depends on the goodwill of the States concerned, it must not be forgotten that a State which was not prepared to regard the recommendation would, in all probability, find that it was refused the prior authorisation which it must obtain (under Article 15) from the intervening States over whose territory the flight would require to be made before establishing a regular air service between two points in its territory.

Although the Legal Sub-Commission eventually proposed a new text - one which was not unanimously approved - whereby "territory" was to mean the geographical entity represented by home territory, Protectorates, Colonies, territories under Mandate, and Dominions, taken separately, thus excluding all

possibility of cabotage one with another, the Commission, at its Session held at Lisbon in June 1934, finally contented itself by recommending the contracting States to invoke Article 16 only with extreme reserve and with care to safeguard to the greatest possible extent the spirit of liberty and equality of treatment contained in the Convention.

In the second place, there has been some ambiguity in interpreting the words "transport commercial", translated in the English text as "carriage for hire". The Legal Sub-Commission has also considered this question, and the Commission at its Lisbon Session, approved of a new text under which the phrase "carriage of goods for hire" is replaced by the more elaborate phrase or provision, carriage of things

"(a) for hire or reward (of any kind whatsoever);
"(b) even without remuneration if the transport is effected by an air transport undertaking, save, in the case of such undertaking, the transport necessary for the proper working of the air services which it carries out."

This amendment will probably be made in the next Protocol of Amendments to the Convention.

The corresponding provision of the Havana Convention is similar to the present Article of the Paris Convention except that "merchandise" is used instead of "goods" and the contracting States can apply the reservations to "other remunerated aero: nautical operations wholly within its territory", (Art.22.).

The First International Conference on Private Aviation Law which met at Paris in 1925 prepared a draft Convention "relative à la responsabilité

"du transporteur dans les transports internationaux par

"aéronefs." The text was submitted to the Governments concerned for favourable examination and the C.I.T.E.J.A. having considered it in detail, it was possible for the twenty three States represented at the Second Conference held at Warsaw, in 1929, to sign a Convention "pour l'unification de certaines règles relatives au transport aérien international." This Convention was ratified by Great Britain and its provisions given effect to in the Carriage by Air Act, 1932. (1) It came into force as far as that country was concerned on 15th May 1933 (2) and has been extended to the Channel Islands and the Isle of Man, and to the Colonies, Protectorates, and Mandated Territories specified in the Schedule to the relative Order in Council. It is now operative between eighteen States, including the United States of America and the Union of Soviet Socialist Republics. (3).

The Convention applies to all international carriage of persons, luggage, or goods performed by aircraft for reward, as well as to gratuitous carriage by aircraft performed by an air transport undertaking, (4). The test of carriage being international is, that if it commences in the territory of one contracting State, it must at least have an intermediate stopping place in the territory of another contracting State, if its termination does not happen to be in the territory of a different State from that in which it commenced. The Convention also applies to carriage performed by the State or legally constituted public bodies, provided that otherwise it can be regarded as international carriage falling within

(1) 22 & 23 Geo.V. Ch.35.

(2) S.R.O.No.226.(1933).

(3) S.R.O.No.161.(1935).

(4) Art.1.(1).

its provisions (5). However, there is a Protocol to the Convention whereby any adhering State may declare at the time of its ratification that this provision is not to apply to

"international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty, or authority,"

and the United States of America has taken advantage of the Protocol. The Convention does not apply to carriage performed under the terms of any International Postal Convention.

(1) Documents of Carriage -

The most important fact about the Convention is the limitation of the liability of the carrier by air, but that is only effective if the conditions of the Convention have been complied with. Thus the carrier by air is bound to deliver certain documents of carriage. In the case of passengers, he must deliver a ticket (6) and for their luggage he must deliver a luggage ticket, except in the case of the objects of which the passenger takes care himself (7). Certain particulars have to be given on each of these documents, and the luggage ticket must be issued in duplicate, one part for the passenger and the other for the carrier (8). In the case of carriage of goods, a document, to be known as an "air consignment note" (9) has to be prepared in triplicate, one for the carrier, which will be signed by the consignor, one for the consignee, to be signed by the carrier and the consignor and to accompany the goods, and the remaining part to be signed by the carrier and handed to the consignor after the goods have been accepted. (10)

(5) Art.2.(1).

(6) Art.3.(1).

(7) Art.4.(1).

(8) Art.4.(2).

(9) Art.5.(1).

(10) Art.6.(1) & 6.(2).

(11) Art.11.

The absence, irregularity, or loss of any of these documents of carriage does not affect the existence or validity of the contract of carriage, which shall continue to be subject to the rules laid down by the Convention, but, if the carriage has been entered into lacking the documents, or, in the case of the luggage ticket and air consignment note, lacking certain vital particulars, the carrier is debarred from availing himself of the provisions of the Convention limiting his liability.

The air consignment note is an interesting document, and, at first sight, seems to resemble the Bill of Lading used in the case of carriage by sea. This latter document has always been regarded as a symbol of the goods themselves and its transfer had the same effect in law as the actual delivery of the goods. It is unique in this respect, and the question may arise as to the effect of the air consignment note, whether there has been created another document which can be regarded as a symbol of the goods to which it relates. I feel it would be difficult to give it that effect. According to the Convention, the air consignment note is prima facie evidence of the conclusion of the contract of carriage, of the receipt of the goods, and of the conditions of carriage (11). The Convention is, after all, for the purpose of unifying the rules of international air carriage and I submit that in the air consignment note it merely produces a document for that purpose. There is nothing in the Convention to show that the document was intended to be regarded as a symbol of the goods to which it relates with the results which follow the recognition of the Bill of

Lading as such a document. Indeed, the provisions of the Convention point in the opposite direction for although the consignee is in possession of his part of the air consignment note, his right to the goods does not arise until they have arrived and he hands the note to the carrier. In exchange therefor he is entitled to get delivery of them (12), but, until that time, the consignor has full right to do just what he pleases with the goods.

"subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure." (13)

True, it is also provided that the foregoing provisions are not to affect either the relations of the consignor or the consignee with each other, or the mutual relations of third parties whose rights are derived either from the consignor or consignee (14), but, taking the Convention as a whole, it would appear that the air consignment note is only a document of carriage for the purpose of regulating the liabilities of the carrier, nothing more, and could not be used to transfer the goods, as, for example, by way of pledge,

(ii) Liability of the Carrier -

In discussing the laws which would be applied to carriage by air under the common law, we saw it had been concluded that a carrier by air might be either a common carrier or a private carrier according to the existing rules for determining that question, that he could limit his liability, and that there would be no warranty that the

(12) Art.13.

(13) Art.12.(1)

(14) Art.15.(1).

aircraft was "airworthy" in the sense that a ship must be seaworthy (15). The Companies, members of the International Air Traffic Association have supplemented the Warsaw Convention by agreeing on certain detailed conditions concerning the contract of carriage by air, to cover not only international carriage under the Convention but also national and other international carriage. These conditions, which are known as the new conditions, came into force at the same time as the Convention itself and superseded the old conditions which had been observed by the Companies prior to that date. These old conditions, which, as used by Imperial Airways Limited, provided that the Company was not a common carrier and did not accept liability as such, were considered in the case of *Aslan v Imperial Airways* (16) when a parcel of gold was lost from an Imperial Airway's machine on a journey from Bagdad to London, there being nothing to show how the loss had occurred. Mackinnon J. gave judgment for the defendants, holding (a) that while a carrier by air could be a common carrier, in this case there was no doubt that the defendants were not common carriers and were therefore only liable for negligence; (b) that they could take steps to limit their liability; and (c) that there was no implied warranty of airworthiness which would make it incumbent on the defendants to provide a bullion room. All that was required was to provide an aeroplane fit to fly and to use reasonable care and skill to see that it was safe for the carriage of the plaintiff's goods.

In contrast, there is the American case of *Curtiss-Wright Flying Service Inc. v Glose G.C.A.*

(15) Ante, p.46.

(16) (1933).49 T.L.R.415.

decided in 1933, and the New Zealand case, mentioned by Prof. M'Nair, of Strand v Dominion Air Lines, decided in 1931. In the former, it was found that an aircraft carrier was a common carrier and not able to limit his liability to 10,000 dollars in a claim by a widow whose husband was killed in an accident to the defendant's aircraft in which he was a passenger, and which was the result of negligence on the part of the pilot. This is an extension to the case of passengers, of the principle applied to in England to the very limited class of common carriers of goods, and, in view of the decision in Aslan v Imperial Airways, the carrier by air who adopts the rules of the International Air Traffic Association is, in England, to be regarded as a private carrier. In Strand v Dominion Air Lines, the defendants were held not to be absolved from liability to the representatives of a passenger who was killed while travelling "entirely at his own risk", on the grounds that this did not protect them from a breach of the Aviation Act or the implied condition that the aircraft was airworthy and that the pilot held the certificate required by the law for the carriage of passengers.

Under the Warsaw Convention, the carrier is liable to make reparation in three cases; for damage sustained in the event of death or wounding of a passenger, or any other bodily injury suffered by a passenger, if the accident took place on board the aircraft or in the course of any of the operations of embarking or disembarking (17), a liability which, in the United Kingdom, is declared to be in substitution for any liability of the carrier in respect of the death of that passenger either under any Statute or at common

(17) Art. 17.

law (18); for damage sustained in the event of the destruction, or loss of, or damage to luggage or goods sustained during the carriage by air-carriage by air having a very wide meaning (19); and for damage occasioned by delay in the carriage by air of passengers, luggage, or goods (20). As against this absolute liability the carrier, besides the provisions limiting his liability, can avail himself of three defences, under each of which he is exonerated from liability, namely, when he proves that he or his agents have taken all necessary measures to avoid the damages or that it was impossible to do so; in the case of goods and luggage, if he proves that the damage was occasioned by negligent pilotage or negligence in handling the aircraft or in navigation, and that in all other respects he or his agents have taken all necessary measures to avoid the damage (21); and where he proves contributory negligence (22).

(iii) Enforcement of the claim - The limits of the carrier's liability are 125.000 francs for each passenger and 5.000 francs per passenger for objects taken in charge by that passenger. In the case of luggage or goods the liability is limited to 250 francs per kilogram unless a special prior declaration of value has been made (23). However, the carrier cannot avail himself of the provisions excluding or limiting his liability if he, or his agents acting within the scope of their employment have been guilty of wilful misconduct, or default which is equivalent to wilful

- (18) Carriage by Air Act, Sec.1(4). (21) Art.20.
(19) Art.18. (22) Art.21.
(20) Art. 19. (23) Art.22.

misconduct (24). Neither can he make provisions whereby he is relieved of his liability or otherwise lowers the limits thereof (25).

Under the Convention, therefore, a carrier by air is at one and the same time a common and a private carrier. He is a common carrier in so far as his liability is concerned since he cannot limit it or exclude it. Yet he is a private carrier in the sense that he may refuse to enter into any contract of carriage (26). The conditions seem to meet with fairly general approval although the International Congress of Aerial Navigation has suggested a slight modification to the effect that if a carrier has taken out an accident insurance with an authorised company to the extent of 125,000 francs for the benefit of any passenger he should be exonerated from further liability in respect of such passenger under the Convention, excepting, of course, his liability under Article 25.

(iii) Enforcement of the claim -

The Defendants, in the case of death of the person liable, are those legally representing his Estate (27) and the Carriage by Air Act has made special provision as to who will be the plaintiff, in the case of the death of a passenger (28), the liability being enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death. "Members of the family" is given a wide meaning and includes any of the next-of-kin, as well as illegitimate and adopted children (29).

(24) Art. 25.
(25) Art. 23.
(26) Art. 33.

(27) Art. 27.
(28) Sec. 1.(4).
(29) Schedule II. Sec. 1.

Article 28 of the Convention enacts that

actions may be brought, at the option of the plaintiff

"in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident or has his principal place of business, or has an establishment by which the contract has been made, or before the court having jurisdiction at the place of destination".

Where a State has not availed itself of the provisions of the Protocol, it is to be deemed to have submitted to the jurisdiction of any court in the United Kingdom in which any action is brought to enforce a claim for carriage undertaken by it (30) with the result that the rules of such court may determine how the action is to be commenced and carried on.

Actions prescribe two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date of which the carriage stopped.(31)

While the rules themselves, being of a technical nature, are not the appropriate subject of discussion in a legal treatise, there are several matters arising out of their application which are suitable for consideration. In particular, these questions whether, once a collision has occurred, the rules of negligence to be applied in determining questions of liability will be the common law rules or the maritime rules, and in what cases, if any, the Courts possessing Admiralty Jurisdiction will be considered the appropriate tribunals before which claims can be decided.

Taking first, collisions between aircraft while in the air. These may be either over land or territorial waters, or over the high seas. In America, the uniform State Law has provided that liability for damage caused by a collision on land

(30) Carriage by air Act, Sec.2.

(31) Art.29.(1).

(1) S.R.O.No.1308.(1922).

apter, 11.

Collisions; Wreck and Salvage.

It was inevitable that a Code of Rules of the air would have to be drawn up, which would require to be of a specialised and highly technical nature since aircraft could operate in a vertical as well as in a horizontal direction, and, unlike motor cars or ships, could not stop or reverse to avoid a collision without serious results to the aircraft themselves and to their occupants. These Rules of the Air are to be found in Annex D. of the Paris Convention, and under Article 25, contracting States undertake to ensure that every aircraft carrying its nationality mark will comply with them. Schedule IV of the Consolidation Order gives effect to these Rules with regard to British Aircraft(1).

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Taking first, collisions between aircraft while in the air. These may be either over land or territorial waters, or over the high seas. In America, the uniform State Law has provided that liability for damages caused by a collision on land

(1) S.R.O.No.1508.(1923).

or in the air shall be determined by the rules applicable to torts on land(2). Accordingly when both parties are negligent, the loss will lie where it falls, and there will be no question of apportionment:ing it as would be in the case under maritime law. There is no such express enactment in Great Britain but while as we have seen both Dr. Hazeltine and Dr. Spaight would have applied the principles of maritime law, I can see nothing to indicate that in such cases any but the common law rules would be applied. The case of *Cubitt v Gower* supra can be taken as affirming that where the collision occurred between two aircraft on land the common law rules of negligence would be applied and the position would be the same if the collision occurred in the air. The only difference, if it took place over the sea, would be that a Court having Admiralty Jurisdiction would be the proper tribunal to hear the claim. Although the Secretary of State is empowered to confer jurisdiction on any Court exercising Admiralty jurisdiction in respect of proceedings taken to enforce any claim under the Air Navigation Act or any other claim in respect of aircraft (3) he has not yet done so, and such claims will, in the ordinary course, be determined by Courts having common law jurisdiction.

The principle of absolute liability imposed under Section 9 of the Air Navigation Act cannot by any stretch be applied to collisions between aircraft, unless, as in the case of *Cubitt v Gower*, the collision is between one aircraft which is "taking off" and another which was stationary. It is interesting to conjecture what would have been the position in that case if both aircraft had been in the act of

(2) 10 Sec. 6.

(3) 10 & 11 Geo.V.Ch.80.Sec.14.(2)

"taking off" or one "taking off" and the other "landing". They would both be on the ground and it would seem that the common law rules of negligence would be applied to the collision. In such a case, if one was in breach of a statutory provision that would be prima facie evidence of negligence. However, in many cases of collisions, particularly those in the air, it may be difficult to determine who was to blame, and it is conceivable that in those circumstances, the rules laid down by Lord Birkenhead in "The Volute" (1922. 1 A.C.129) should be applied, the effect being that where events are so intermixed that there is not sufficient time to distinguish which act was first and which was last, the case must be decided on broad principles, by asking who really caused the accident.

As we have also seen a collision will not necessarily occur in the air, or between two aircraft on land. There is another type of aircraft - that devised to manoeuvre on water - and the collision may be between two such aircraft, or between one such aircraft and another object, probably a ship. Assuming that the collision is between two aircraft manoeuvring on the water, would the position be different from that already discussed had they been manoeuvring on land or would the law maritime - the principles of which are the same in England and in Scotland - apply? Neither in the definitions of "ships" in the Merchant Shipping Act or in the authorities discussed in the Gas Float Whetton No.2.(1896 L.R.Prob.Div.42) could it be said that an aircraft designed to manoeuvre on water was a "ship" but the Consolidation Order enacts that

"every aircraft manoeuvring under its own power on the water shall conform to the Regulations for preventing Collisions at Sea, and for the purposes of these Regulations shall be deemed to be a steam vessel."(4)

(4) S.R.O.No.1508.(1923).Sched.IV. Sec.49.

Does this make any change on the common law? That is as far as the Order goes, and, as it does no more than provide for an aircraft being regarded as a ship for the limited purpose of conforming to the ~~present~~ regulations for preventing collisions, it cannot be said that it has the effect of attracting the law maritime to the case of a collision between two aircraft manoeuvring on the water. Accordingly, the common law rules would be applied in this case also. The same principle would apply in the case where an aircraft manoeuvring on water collided with any other moveable object, other than a ship. Prof.

M^rNair, commenting on the effect of the Order, remarks

"I do not think an aircraft becomes a steam ship for any other purpose, such as that of attracting the admiralty procedure in rem." (5)

~~as before~~ While there is a tendency in America to regard an aircraft as

"a vessel within the jurisdiction of admiralty when it is in fulfillment of its functions as a traveller on water and has put aside for the time being its function and capacities as a traveller through the air" (6)

this is quite contrary to the Air Commerce Act, which expressly enacts that the Shipping Laws of the United States, including any definition of vessel or vehicle found therein, and including the rules for the prevention of collisions, shall not be construed as applying to seaplanes or other aircraft, or to the navigation of vessels in relation to seaplanes or other aircraft (7). Confirmation of the view taken by Zollman is to be found in the Uniform State Law under which a hydroplane while at rest on water and while being operated on or immediately above water shall be governed by the rules regarding water navigation;

(5) Law of the Air, p.100.

(6) Zollman, Law of the Air, p.44.

(7) Sec.7.

while being operated through the air, otherwise than immediately above water, it shall be treated as an aircraft.(8) Actually there is no real conflict between the two for it is quite apparent that the purposes served by the Uniform State Law is precisely that served by the British Order, and the law maritime would not be applied to a collision between two aircraft, or hydroplanes, while on the water. The fact that they are governed by the rules relating to "water navigation" does not otherwise make them ships for the purposes of maritime law.

In the case of collisions between ships, the law allows the owner to arrest the ship, and, by so doing, to establish jurisdiction against it i.e. an action in rem. That being so, where a ship collided with an aircraft on the water, an action in rem would lie against it although it would not against an aircraft in the converse case, since an aircraft is not a "ship". In both cases liability would require to be apportioned under the maritime law.

Before leaving the subject of collisions, mention must be made of the work of the C.I.T.E.J.A. The Comité has been actively engaged in preparing a draft Convention for the unification of certain rules relative to aerial collisions, and embracing every collision between two aircraft in motion. The damage caused by one aircraft to another aircraft in motion would be covered by the Convention even although there had been no actual collision. The draft was approved by the Comité at its Berlin Session in September 1934 and is now in course of

(8) Sec.1.

being submitted to the various Governments for their observations thereon with a view to having it signed at the next Conference of Private International Aerial Law. The result of the Convention would be to limit the liability of the operators of the colliding aircraft, in respect of damage to the aircraft themselves, to the various sums detailed in the Convention; to passengers luggage and goods carried, to the ^{sums} same detailed in the Warsaw Convention; and to third parties on the surface, to the sums detailed in the Rome Convention. But, more important, liability would be determined according to rules analogous to maritime law, and, where both aircraft were equally negligent, the liability for the damages suffered will be equal, otherwise liability will be apportioned in accordance with the degree of negligence attributed to each. Only in the case of accident, or force majeure will the damage lie where it falls.

Finally, an attempt is made to settle the vexed question of jurisdiction arising out of collisions between aircraft. It is proposed that actions will be competent in the territory of the High Contracting Parties, at the choice of the Plaintiff, either in the courts of the country of the defendant's domicile, or of the country where the collision occurred, or, if either of the aircraft involved in the collision has been seized, in the courts of the country where it has been so seized, If the domicile of the defendant or the place where the collision took place is not in the territory of one of the contracting parties, then the action may be brought in the courts of the country where one or other of the aircraft is registered.

Wrecks and Salvage - land and the persons rendering

assistance The application to aircraft of the principles of maritime law in relation to wrecks and salvage which had been foreshadowed prior to 1914, was put into effect both in the Paris Convention and in the Havana Convention. The former provided that

"with regard to the salvage of aircraft wrecked at sea, the principles of maritime law will apply, in the absence of any agreement to the contrary,"(9)

and, apart from a slight transposition of the words, the provision of the latter is identical.

Principal The air navigation Act provided in section 11 that

"the law relating to wreck and to salvage of life or property, and to the duty of rendering assistance to vessels in distress (including the provisions of the Merchant Shipping Acts, 1894 to 1916, and any other Act relating to those subjects) shall apply to aircraft on or over the sea or tidal waters as it applies to vessels, and the owner of an aircraft shall be entitled to a reasonable reward for salvage services rendered by the aircraft to any property or persons in any case where the owner of a ship would be so entitled,"

and by Order in Council the necessary modifications and exemptions could be made in applying these provisions. This was done in 1921 when various sections of the Merchant Shipping Acts, as amended by the Order (10), were applied to aircraft. It was further provided that Courts having Admiralty Jurisdiction should have jurisdiction over claims under Section 11 and the jurisdiction so conferred may be exercised either by proceedings in rem or by proceedings in personam. The definition of a "wreck" is extended to include "any aircraft or any part thereof or any cargo thereof found lying derelict." It will be seen that no mention is made of salvage of

(9) Art.23.

(10)S.R.O.No.1286.(1921).

wrecked aircraft on land and the persons rendering assistance in such cases are still at the mercy of the owners of the wreck for recompense for their services.

Section 11 of the Air Navigation Act was discussed recently when the master and crew of a steam trawler claimed salvage for rescuing a seaplane with valuable cinematograph equipment off Cape Dan, Greenland, in the Sheriff Court of Aberdeenshire at Aberdeen (11). In that case the Sheriff Substitute, whose judgment was affirmed on appeal by the Sheriff Principal, held that the claim was incompetent both at common law and under the Air Navigation Act. He held, on the authority of the *Gas Float Whitton No.2. supra* that a seaplane is not a "ship" within the meaning of the Merchant Shipping Acts or decided cases, and, that the action was incompetent under section 11 of the Air Navigation Act, since that Act only applied, according to its Preamble, to "aircraft, whether British or Foreign, within the limits of His Majesty's jurisdiction, and in the case of British aircraft..... both within such jurisdiction and elsewhere."

Greenland was outwith His Majesty's jurisdiction, and, as the aeroplane was American and not British, the pursuers were not entitled to the benefit of Section 11.

At the same Session as it submitted the draft Convention relating to collisions, the C.I.T.E.J.A. also submitted one for the unification of certain rules relative to the assistance and salvage of aircraft. The object of the Convention is to make it obligatory on the commander of an

value of the aircraft before the accident.

(11) Watson v R.C.A. Victor Co. 1935, 51 S.L.R. 93.

aircraft or captain of a ship to render assistance, on the understanding that for so doing they will be suitably recompensed, but, whereas a captain of a ship would only be bound to render assistance to every person in the sea in danger of being lost, either on an aircraft or as the result of an accident to an aircraft, the commander of the aircraft has to render assistance, not only to persons in danger of being lost in the sea, but also to every person in danger of being lost, or in danger of being lost following an accident to an aircraft " quel que "soit le lieu ou elle se trouve." This is an endeavour to embrace the cases of hardship presently existing where salvage services are rendered to aircraft wrecked on land, and where there is no recompense legally due, but, as the International Air Traffic Association has very truly pointed out, the salvage of aircraft in deserted localities should be made the subject of a separate draft differentiating the principles of the Brussels Convention. In any event the Comite is not altogether sure of the position since it has requested its Rapporteur to examine in what way a greater precision or limitation could be arrived at for such an obligation.

Where assistance has been rendered in terms of the obligation incumbent under the Convention the salvor is to be indemnified for expenses usefully and necessarily incurred, as well as for any damages sustained during the operations, to the extent of 125,000 francs per person saved, but the sum to which he is entitled must not exceed the value of the aircraft before the accident,

accident, this value being calculated on the basis of 250 francs per kilogram of its weight. In addition, if the aircraft or its cargo is salvaged, there will be further remuneration calculated on the basis, first, of the success obtained, the efforts and accomplishments of those rendering assistance, the danger run by the aircraft or ship assisted, by its passengers or equipment, by its cargo, by the salvors, the time employed, the expenses and damages sustained, the risk undertaken by the salvors, and the value of the material hazarded by them, due regard being had to special appropriation where it exists of the salvors property for salvage purposes; and, second, of the value of the things saved. In no circumstances is the remuneration to exceed the value of the goods salvaged at the conclusion of the salvage operations.

The draft is imperfect in many respects. For instance, while the obligation to render assistance to persons is absolute, it appears that no special remuneration is to be given for saving them, only the actual outlays incurred in so doing. It would be equitable to allow some additional remuneration under this heading, and an addition of ten per cent. is the suggestion of the International Air Traffic Association. Experience has shown that considerable public money can be expended searching for reckless individuals who undertake risky and foolhardy flights for no other apparent purpose than that of losing themselves. The obligation to render assistance would rest on aircraft in flight or ready to start on a flight, but these cases, more often than not, necessitate prolonged organised searches and

aircraft have to be called from aerodromes and make special flights. In such cases, it would only be right that the persons saved would require to pay some special additional remuneration to their rescuers for the time and trouble taken in locating them.

The International Air Traffic Association at its Session at the Hague in 1934 suggested that the time was not yet ripe for such a Convention as had been drafted and that it would be desirable to postpone consideration of it meantime. This may or may not be the case, but the necessity for a Convention seems to be more urgent in the case of assistance to persons with wrecked aircraft on land and in deserted areas, as there are special considerations affecting such assistance. The maritime rules relating to wreck and salvage can quite easily be adapted, and work well, in the narrowly defined limits within which they can be applied. Rather should the C.I.T.E.J.A. confine its attention to a Convention which will cover the cases, far more numerous, which are not covered by the maritime rules, and where, at the present time, the salvor who has rendered valuable services has no right to recompense which he can enforce in a Court of Law.

was registered, if the aircraft had two thirds at least of its directors had the same nationality, and if the Company otherwise satisfied all the conditions laid down by the laws of that State (Art. 7.) an aircraft could only be registered validly in one State (Art. 8.).

These provisions, however, were not adopted

Nationality and Registration - the Law in the Air.

When the question of jurisdiction and of the law of the air was discussed in a previous Chapter (1) it was seen that a decision as to what law was to be applied to crimes, torts, and the like committed in the air, depended largely on a solution of the question of what nationality was to be attributed to an aircraft. It was also seen that when the Diplomatic Conference met in Paris in 1910 it decided that nationality was to be attributed either on the basis of the nationality of the proprietor or the country of his domicile (2).

In common with other problems, the matter of nationality was speedily if not satisfactorily solved in 1919, in the Paris Convention, which provided that to enjoy the benefits under the Convention aircraft must possess the nationality of a contracting State (Art.5), and aircraft were to possess the nationality of the State on the Register of which they were entered in accordance with the provisions of the Annex to the Convention (Art.6). It was also laid down that aircraft could only be registered in a contracting State if they belonged wholly to the nationals of that State, and, with regard to a Company, it could only be registered as owner if it possessed the nationality of the State in which the aircraft was registered, if the President and two thirds at least of its Directors had the same nationality, and if the Company otherwise satisfied all the Conditions laid down by the laws of that State (Art.7.). An aircraft could only be registered validly in one State (Art.8.).

These provisions, however, were not adopted

(1) Ante, p.51.

(2) Ante, p.92.

in their entirety, either in the Spanish-American Convention or in the Havana Convention. The former allowed contracting States to make certain reservations by Protocol if the foregoing provisions were in any way contrary to the provisions of their own national laws. The latter adopted in principle, the Sixth and seventh Articles of the Paris Convention, but, in deciding in what manner nationality was to be attributed, it provided that "the registration of aircraftshall be made in accordance with the laws and special provisions of each contracting State." (3)

For reasons to be considered later, the provisions of the Paris Convention which had been so readily agreed upon began to find adverse critics and gave rise to difficulties, with the result that at the Conference called to consider the revision of the text of the Convention they were brought under review. The German delegate, Dr. Wegerdt wanted Article 7 altered so that nationality would be determined in accordance with the country of the domicile of the proprietor of the aircraft. The French and Dutch representatives desired no change, but the British, Belgian, Canadian and Spanish delegates were in favour of some alteration. On this occasion, it was the view of the American representative which was accepted and the Paris Convention was, by the 1929 Protocol, assimilated to the Havana Convention, Article, 7, as now in force, reading

"the registration of aircraft referred to in the last preceding Article shall be made in accordance with the laws and special provisions of each contracting State".

The result of this is simply that the controversy which existed prior to 1914 is, after the lapse of

a quarter of a century in the same position as it was then, except, perhaps, that there are now new voices to be heard in the discussions.

Once again the old question is asked, is the aircraft to be assimilated to the ship for the purpose of conferring nationality? That was the position under the Paris Convention as originally framed. The aircraft, like the ship had the nationality of its owner and could only be registered in the State of which he was a national. Now States are free to do as they please and the protagonists of the view that registration of an aircraft should not be dependent on the nationality of the owner have lost no time in bringing forward their arguments that registration, and accordingly, nationality, should depend on domicile. Chief among those is M. Pittard, the Swiss representative on the C.I.T.E.J.A., and at the Budapest Session of the Comité he gave a detailed exposition of his views the substance of which is simply that an aircraft has more the characteristics of an automobile or locomotive, or even a boat engaged in river navigation. The automobile, under the Convention of 1909 and that of 1926, must carry the sign of the State in which it is registered if it is to engage in international journeys. Under the Geneva Convention of 1930, boats engaged in river navigation do not possess a nationality such as is possessed by ships engaged in navigation on the high seas, but must be registered in some State, and it is the owner who selects the State in which he desires his boat to be registered when it is qualified to be entered in more than one State. That being so, should not an aircraft be

subject to a somewhat similar regime in this matter of registration and the conferring of nationality? According to M.Pittard, an aircraft cannot be regarded, like the ship, as a part of the territory of a State. It is no more than a means of communication and transport which the State has no more than an interest to regulate, and registration should, therefore, depend not on nationality, but on the domicile or residence of the owner. He sums up by saying

"Comme nous le verrons dans la suite de cet exposé si nous abandonnons le critère de nationalité pour prendre celui de domicile, nous supprimons la difficulté qui naît de la différence de nationalité entre les diverses personnes qui ont des droits sur l'aéronef."

One of the reasons for giving a full-blooded nationality to a ship is that when it is on the high seas it can be regarded as a part of the territory of a state to which it belongs, and, that being so, it is under the protection of that State and subject to its laws. To this very forceable reason, M.Giannini(4) adds several political and economic reasons, such as protection of national construction, trade, and national defence. These political and economic reasons, he maintains, apply with equal force to aircraft, especially in view of securing that, in the event of an armed conflict, all the resources of air power, air construction, and material will be at the disposal of the State. This he maintains makes it imperative that a State should only give its national protection to aircraft owned by its own nationals. Therefore, nationality should continue to be attributed on the same basis

(4) La Nazionalita Degli Aeromobili - Revista Aeronautica, Anno VII.No.8.1931.(IX)

as it was attributed under the original seventh Article of the Paris Convention.

While political and economic reasons are not properly the subject of a legal argument, they do give weight to the argument first advanced for attributing nationality to a ship - a reason which, it is submitted, applies with equal cogency in the case of aircraft - that while on the high seas a ship is, and must be subject to the laws of the State whose flag it flies. The automobile and the locomotive, the boat engaged in river navigation, are at all times within the territory of a State. An aircraft may be, and most of the time will be, within such territory, but it can also engage in flight over the high seas. Then it must be subject to the laws of the State whose flag it flies and must have a nationality. This is an unsurmountable obstacle in the way of classifying the aircraft with the automobile and the boat engaged in river navigation. It is true that while an aircraft is in flight over the territory of any particular State, it is within the jurisdiction, and subject to the laws of that State, but when not within the jurisdiction of any State, it is subject to the laws of the State of the Flag.

However, it was not for this that the Paris Convention was altered to enable States to attribute nationality to aircraft other than those owned by their nationals. The provision had given rise to a very severe limitation which was not foreseen when the Convention was signed. As between nationals of States parties to the Convention no real difficulty arose. A Frenchman living in England who purchased

an aeroplane there could not register in England, since he was not a national (5), but he could engage in flight over Great Britain under the Convention if he registered the aircraft in France. But, assume that the purchaser of the aeroplane was not a national of a State party to the Convention or of a State with which a special agreement had been concluded. What was the position then? Simply this, that being unable to register the aircraft in Great Britain, he was precluded from flying his own aeroplane, and, as a result, precluded from purchasing one, a position, it might be argued, which was prejudicial to the development of the aircraft industry. Similarly, there could be the spectacle of an Englishman living in France and purchasing an aeroplane there which would require to be registered in Great Britain. The result would be that, while the aeroplane might never see Great Britain at any time or ever be in the airspace above British territory, it would nevertheless be subject to all the rules and regulations contained in the British Orders in Council.

Companies, also, are faced with the same difficulties since before a Company can be registered as the owner of an aircraft in Great Britain it must be registered and have its principal place of business in His Majesty's Dominions, and the Chairman and at least two thirds of the Directors must be British subjects or persons under His Majesty's protection (6), this in conformity with the old provisions of the convention.

(5) S.R.O.No.1508.(1923).Sched.I.(1).

(6) do. do.

country. Now, contracting States are free to alter these requirements to suit their own convenience. Can any change safely be made and would such change be in the best interests of the States concerned? The International Chamber of Commerce has recommended States to discard the principle that registration of an aircraft is dependent on the nationality of its owner since aircraft owned by them.

"l'acquisition et l'exploitation d'aéronefs par des étrangers sont ainsi rendues difficiles." (7)

and if States decide to maintain nationality as the prerequisite to registration, then, in the case of Companies or Corporations, the nationality thereof should be determined by its "siege social" since "il ne semble pas justifié de déterminer la nationalité d'une Société d'après la nationalité de ses membres et de ses administrateurs." (8)

The League of Nations Air Transport Co-operation Committee, in view of the fact that States are now free to settle each for itself the conditions under which aircraft are to be registered, consider it should be possible to register aircraft, the owners of which are foreigners settled in their territory. The Committee, therefore,

"expresses a hope that the rule based on the effective domicile of the owner, subject to any rules laid down by the national law concerning duration, will be uniformly adopted for this registration. It being admitted that each aircraft must be registered in one country, and in one country only, these uniform rules should allow the possibility of registering aircraft belonging to national companies having some foreign capital or directors." (9)

Since all States were not parties to the Paris Convention, there is also the actual legislation of States not bound by it, from which information may be gleaned. For example, under Argentine Law, aircraft kept for four months in the

(7) R.A.I., No. 2, p. 220.

(8) do. p. 219.

(9) R.A.I., No. 4, p. 156.

country must be registered on the Argentine Register and so become Argentine national aircraft, and, while under the Law of Chile, only nationals may be registered as owners, the foreign owner of a business house established in the country, or the foreigner who carries on a profession or trade, is assimilated to nationals for the purpose of the registration of aircraft owned by them.

While there is much to be said for M. Pittard's opinion that

"il est conforme au droit et a logique de soumettre l'individu et ses biens aux lois du pays dans lequel ils se trouvent"

it is more than likely that States will not exercise the right which they now possess to alter their national laws in this respect, for there are obvious advantages in only registering aircraft owned by their nationals, especially from the aspect of national defence and requisition in times of war. The difficulties noticed can easily be remedied by a more general adhesion of States to the Paris Convention, but, if this is not possible, special bilateral agreements could be entered into if desired. It is unfortunate that the uniformity of principles which was attained in 1919 has had to be swept aside, but no doubt in the future, when more experience has been gained, the whole matter of attributing nationality will again be the subject of international agreement.

There is one other topic, closely akin to nationality and registration, namely the proposal to set up an Aeronautic Register, made by the C.I.T.E.J.A. which adopted the text of a draft Convention for this purpose in 1931. It is the culminating blow to those who desire aircraft to remain strictly moveable

property, like the automobile, the transfer or pledge of which is effected by simple delivery or "handing over"

The purpose of such a Register, which might be that on which aircraft were entered under the Paris Convention, or a separate Register, is the publication of the ownership of and real rights affecting every aircraft. The proprietor would be responsible for furnishing the necessary particulars which would be entered on the Register kept by each State, and every aircraft which was registered and acquired its nationality according to the laws it laid down for that purpose, would require to be entered. Every incumbrance or real right which affected the aircraft would be noted. Transfer could only be effected after the new owner's name had been entered on the Register, and, if a national of a different State acquired the aircraft, it would only be removed from the Register of the first State after a Certificate had been obtained from the second State with a copy of the completed entry in the new Register. If there were incumbrances affecting the aircraft noted in the Register of the first State, these would also be noted in the Register of the second, and the transfer would only be made subject to such incumbrances. A third party would not be bound by any real rights or incumbrances affecting the aircraft which did not appear on the Register.

The Convention has not proceeded further than the draft stage and will require to be considered with great care before it is adopted. The result of its being put into force would be that the sale or pledging of aircraft would be fraught with difficulties which might seriously hinder the development

of aviation as a whole. Apart from that, however, there seems to be no real reason why aircraft, and in particular, small private aircraft, should be shackled with such restrictions on their sale and delivery. The proposals are not, of course, altogether novel, for in France, since 1924, it has been the law that the transfer of aeroplanes could only be effected by writing and did not bind third parties until the transfer had been noted in the Aeronautic Register(10). In Italy, entry on the Register proves ownership (11), and in France (12) and in Finland(13) pledge is only effected by "une inscription hypothecaire" according to the law dealing with the pledge of ships. Nevertheless, it would be regrettable to have aircraft regarded other than as "moveables" for the purposes of sale and transfer and to that extent there is no reason why they should not be assimilated to motor cars, the sale and transfer of which is a comparatively simple matter. The position would be particularly difficult under the proposed Convention if States continued to make entry on their Registers conditional on the owners of aircraft being nationals, since under the Convention, only aircraft so registered could be entered in the Aeronautic Register. This would mean a further impediment on sale and purchase for it would not be easy for the foreign purchaser to acquire a valid and indisputable title.

The law in the air -

There has been little in the way of development in the matter of the laws to be applied

(10) Art.12 of Law of 31st May 1924.

(11) Royal Decree 23 Aug.1933; Ordonnance 11 Jan.1925

(12) Art.13 of Law 31st May 1924.

(13) Law of 15 June 1928.

to acts committed on board aircraft while in flight.
The first draft of the Paris Convention contained
the following Article

".....Legal relations between persons on board an
"aircraft in flight are governed by the law of the
"nationality of the aircraft.
"In case of crime or misdemeanour committed by one
"person against another on board an aircraft in
"flight the jurisdiction of the State flown over
"applies only in case the crime or misdemeanour
"is committed against a national of such State
"and is followed by a landing during the same
"journey upon its territory.
"The State flown over has jurisdiction
"(a) with regard to every breach of its laws for the
" public safety and its military and fiscal laws,
"(b) in case of a breach of its regulations concern-
"ing air navigation."

This Article, which was numbered 23 in the original
Convention, was/in all-embracing terms and it
gave more competence to the State of the Flag than
had previously been suggested, but, as it was not
possible to obtain unanimity, it was omitted from
the Convention ultimately signed and ratified.

Each Country has embodied clauses
giving jurisdiction in its own national laws, and,
as has been seen, the Conventions and draft
Conventions, on particular branches of the law have
each specified the Courts which are competent and
the laws they are to apply for the purposes of
such Conventions.

As regards aircraft to which the Air
Navigation Act and Orders thereunder apply it is
merely provided that any offence under the Act or
Orders is, for the purpose of conferring jurisdiction,

(14) 10 & 11 Geo.V.Ch.80. Sec.14 (1).

(15) Sec.7.

(16) Diario of the Conference. No.18 of 22 Decm.1933.

to be deemed to have been committed in any place where the offender may be for the time being (14). The Uniform State Law is more explicit (15)

"all crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to aircraft while in flight over this State constitutes a tort, crime, or other wrong by or against the owner of such aircraft shall be determined by the laws of this State."

The most interesting and illuminating discussion on this branch of the law in recent times is to be found in the reports of the Seventh Conference of the Pan American Union which met at Montevideo in December 1933 and adopted certain principles on the penal law in the case of delicts committed on board aircraft.

Two projects were put before the Conference (16), one by M. Ramiro Fernandez, the delegate representing Guatemala, and the other by Dr. Moreno the Argentine delegate. The former tended towards the competency of the State of the flag, and the latter, whose project was taken as the basis for discussion, inclined more towards the principle of sovereignty, and, where possible, gave competence to the subjacent state. Finally, the Conference adopted five Articles. Under the first, every act committed on board an aircraft while it is on the ground falls within the competence of the courts of that State, the laws of which will be applied; and, in the second, an aircraft which is on the high seas, outwith the boundaries of any State, is subject to the "Law of the flag". These principles were recognised by the

(14) 10 & 11 Geo.V.Ch.80. Sec.14 (1).

(15) Sec.7.

(16) Diario of the Conference. No.18.of 22 Decm.1933.

Congres Internationaux d'Aviation of 1912 and 1922, and by the International Law Association at Buenos Aires in 1922 and Stockholm in 1924. The suggestion that the law of the State of the Flag should apply when an aircraft is over the high seas confirms, what I have maintained throughout, that, to such an extent, an aircraft must possess a nationality which will follow that of its owner .

The next Article provides for the act committed in an aircraft while in flight over the territory of a foreign state. Such an act falls within the jurisdiction of that State if the aircraft makes its first landing there. Otherwise the State in which the first landing is made is competent but the law of the subjacent State would be applied. Where the identity of the subjacent State is in doubt the law of the Flag will be applied. The pilot of an aircraft is obliged to land at the first aerodrome known to him after a delict has been committed on board. Where damage has been occasioned to persons or property in the subjacent State, that State would be competent and its laws would be applied thus differing from the provisions of the Rome Convention in respect that under that Convention the courts in the country of the offender's domicile would also be competent. The concluding principle adopted was that a State which did not admit of extradition of its nationals would be bound to punish an offender returning to its territory after having committed on board an aircraft any act which would be an offence under its own laws.

1914. Altogether The International Law Association, in 1922 and again in 1924 took a somewhat different

view, inclining rather towards the assimilation of aircraft to the existing International Law as to the jurisdiction of States over ships in their territorial waters, and the application of the principle of "extraterritoriality" to aircraft. It was resolved by that Association that the perpetrator of crimes or delicts committed on board aircraft should be judged and punished in accordance with the following principles. If he was in a public aircraft he would be dealt with by the courts of, and according to the laws of the State of the Flag. He would be tried and punished according to the same rules if he was on board a private aircraft, unless where his offence concerned a violation of the laws of the subjacent State relative to public security or the military or fiscal laws; in the case of a breach of its laws relating to air navigation; and where the acts committed on board had a repercussion in the territory of that State. In these cases, the offender would be subject to the laws and jurisdiction of the subjacent State. The International Law Association thus adopted more the provisions of the rejected Article 23 of the Paris Convention.

The principles adopted by the Pan American Union may not be perfect. Indeed, their deficiencies have been fully recognised by M. Gutierrez, the Rapporteur. Moreover they were prepared to meet the conditions in the American Continent, but, be that as it may, they could be applied equally well in other parts of the world. They embody the principles which were more or less recognised before 1914. Altogether, they are to be preferred to those of the International Law Association which has erred

in following the analogy of the sea in circumstances in which a comparison is not appropriate. If a State is to have sovereign rights in the airspace above its territory then it must be conceded that it has jurisdiction over all persons in such airspace.

Especially is this so where the civil jurisdiction is concerned. It is not tenable to maintain, as the Paris Convention would have maintained, that

"the legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft."

True, while the aircraft is over the high seas, that must be the position, but, while it is over the territory of a State, the most convenient, and, I submit, the true legal position, is that embodied in Article 8 of the Uniform State Law,

"all contractual and other legal relations entered into by aeronauts or passengers while in flight over this state shall have the same effect as if entered into on the land or water beneath."

customs duties is an offence, no matter how it is committed, and as such is liable to heavy penalties under existing laws, but the use of aircraft is fraught with danger to the authorities. It has therefore been enacted that if any person is convicted of an offence under the customs regulations in respect of any British aircraft

- (1) Annex H.
- (2) S.R.O. No. 1598. (1923) Schedule VIII and IX.

Chapter, 13.

Customs.

I have not yet considered at length the customs regulations necessitated as a result of the use of aircraft because they call for an examination of detailed technical Rules and Regulations rather than for an exposition of law.

The Paris Convention (1) set forth certain general customs regulations to be observed by aircraft and these were embodied in the British Order in Council along with the special customs rules to be observed in Great Britain (2). As far as it is possible, persons and goods on aircraft will be subjected to the same customs formalities as are persons and goods entering a country by sea or by land, but aircraft present characteristics by which they lend themselves readily to the evasion of customs formalities. An attempted evasion of customs duties is an offence, no matter how it is committed, and as such is liable to heavy penalties under existing laws, but the use of aircraft is fraught with danger to the Authorities. It has therefore been enacted that if any person is convicted of an offence under the customs regulations in respect of any British aircraft

(1) Annex H. of the peculiar characteristics of air:

(2) S.R.O.No.1508.(1923) Schedules VIII and IX.

registered in Great Britain, the Secretary of State may cancel or suspend the Certificate of Registration of that aircraft(3), thus making a breach of the customs regulations by air a very serious offence for which the offender will be liable not only to the heavy penalties surrounding the offence, as such, but also to the further penalty of losing the use of his machine.

The Annex of the Paris Convention dealing with Customs must be regarded as experimental, and since its inception it has been the subject of much discussion, not only by the I.C.A.N. but also by many other organisations, among which the work of the International Air Traffic Association is outstanding. The result has been that in 1933 the I.C.A.N. approved of a new text of Annex H, but, unlike the other Annexes which can be altered and amended by the Commission itself, the amended Annex H will require to be^{the} subject of a Protocol, and may not enter into force for some considerable time. Little is to be gained by examining the original Annex and the proposed amendments in detail. Indeed such a comparison is difficult, inasmuch as the amended Annex is virtually a new one, so many alterations having been made, particularly in the wording of the text, to avoid ambiguity and clear up difficulties which had arisen in its application. Apart, however, from such detail, there are some general principles arising out of the peculiar characteristics of air:craft which I can conveniently discuss.

It is of the essence of customs regulations that all aircraft entering or leaving any particular

(3) S.R.O.No.1508.(1923).Sec.23.

country must do so in a way in which some manner of supervision over their coming and going can be exercised. As the law stands at present, aircraft are obliged to cross the frontier between certain points fixed by the contracting States, but, if the new Annex is adopted, such a course will only be necessary if the States, in their own discretion, decide to fix points of entry and departure. It is only to be expected, however, that States will continue to make fixed points of entry as otherwise it would be difficult, to say the least of it, to exercise any form of control. So also, aircraft must only depart from and land at aerodromes which are "customs aerodromes", that is, at aerodromes at which provision is made for customs formalities, but it is now suggested that States may relieve certain categories of aircraft from the obligation of departing from or landing at these aerodromes. An example of the type of aircraft which could be exempted under such a provision is the aircraft engaged in some sporting competition or air race, when there would, in ordinary circumstances be no question of customs duties on goods carried.

While it is an easy matter to make such regulations as these, it is not always so easy to observe them, and this is particularly the case with aircraft. They may, for reasons quite outwith their control, be driven off their course, and so be unable to cross the frontier of a State at the designated crossings. Similarly, they may, for identical reasons, be forced to land at aerodromes other than customs aerodromes, and even in parts of the country far removed from any aerodrome. Such instances, if

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they are bona fides, can be provided for but the complications arise in respect that these are the very means used to break the law. The problem then arises as to how far wilful law breaking can be prevented without causing uncalled for hardship to the law abiding operators of aircraft who are compelled through circumstances outwith their control to break the law. Under the existing law, when, by reason of a case of force majeure, an aircraft crosses the frontier at a point other than that designated, it must land at the nearest customs aerodrome on its route, and if forced to land before reaching such aerodrome, the nearest police or customs authorities must be informed. The force majeure must be "duly justified" and, in the case of a forced landing, departure can only be made by permission of the Authorities informed, and the aircraft must proceed to the customs aerodrome which they shall direct to carry out the formalities of customs clearance. Very little change is proposed in these rules, but the phrase "force majeure" disappears to be replaced by "causes outside control", giving a little more latitude to the aircraft acting bona fides.

Nevertheless, while there is little change suggested, the provisions do not altogether meet with the approval of the International Air Traffic Association and were fully dealt with by Major Beaumont, the Legal Adviser of Imperial Airways, Limited, in the Report prepared by him for, and adopted by the Association at its Hague Session in 1934. The suggestion made there is that some distinction should be made between Companies operating regular air lines and police authorities.

other classes of traffic. In the case of the former it creates no little disorganisation of the service for an aircraft failing to cross the frontier of a State between the points fixed, for causes outwith the control of the pilot, to be compelled to land at the nearest customs aerodrome. In the opinion of the Association there is no reason why the aircraft should not proceed to the aerodrome at which it normally intends to land. The same purpose would be served by its so doing. In many cases of forced landings it is almost impossible to communicate with the nearest customs authorities and police officials are difficult to find. Considerable delay might be occasioned before the requisite authorisation to proceed could be obtained, and, in the case of companies operating regular air lines, it might be more convenient to make the commander of the aircraft responsible.

In response to the recommendation of the International Air Traffic Association, the special Committee of the I.C.A.N. for the study of customs questions, taking into account the special guarantees afforded in customs matters by companies operating regular air lines, as well as the desirability in the development of air navigation that customs formalities should be moderated as far as possible, has now proposed to the Commission that further facilities should be made in the new Annex whereby an aircraft could cross the frontier at points other than those designated and that it should be possible to resume flight after a forced landing without waiting the authorisation of the customs or police authorities.

The next matter of importance is the case of air transit from one State to another where the journey has to be made over the territory of a third State. . . What interest is that third State to have in the aircraft or goods which it carries which merely passes over it, or, perhaps lands in it, in the course of a journey to another State? The existing rules distinguish two cases, aircraft crossing without landing and those landing in the course of transit. In the former case the aircraft merely makes its presence known by signals and proceeds on the prescribed route, landing, it is to be presumed at the nearest customs aerodrome, if it enters at the wrong point, although this is not clear. Under the new Annex this latter contingency is expressly provided for. In the case where a landing is effected, this must be at a customs aerodrome, the name of which will be entered in the Log Book, and the customs authorities will make an examination of the papers and cargo. No material change is to be made, but there is some amelioration since the formalities are to "be reduced to the minimum required by the circumstances." But even this does not satisfy the International Air Traffic Association because

"it would appear that the transit State concerned should not require any formalities in connection with goods which are merely passing through the State in transit, whether such goods remain in the aircraft or are unloaded and reloaded into the same aircraft or into another aircraft,"(4)

This is a far reaching development which will not readily find sympathy in many European States, but, viewed in the cold light of reason, there is actually nothing to prevent its adoption.

(4) M.K.Beaumont's Report.

Lastly, there is the general question of the customs duties to be imposed on aircraft themselves, their component parts, and the liquid fuel which they carry, on landing in another State. It is recognised, that, in principle at least, aircraft landing in foreign countries are liable to customs duties if they exist, but if they are to be re-exported, they shall have the benefit of the existing regulations as to bond or deposit of the taxes. Much labour has been spent on this particular subject and the League of Nations has made an exhaustive study of the question of the exemption of liquid fuel carried in aircraft, and which is not mentioned in the Annex, but in the end left the matter in the hands of the I.C.A.N.

The proposed new Annex is more elaborate in its treatment. If aircraft are to be exported they will be entitled to temporary admission free of duty under the conditions contemplated by the customs regulations in each of the contracting States, who will endeavour to reduce their formalities to a strict minimum, especially as regards aircraft belonging to regular air lines. Spare parts and material imported for repair will be similarly treated and, on arrival, the fuel and lubricants contained in the ordinary tanks of the aircraft will be admitted free of customs or other duties. This exemption will not apply to any quantity unloaded. The expression "ordinary tanks" may prove misleading, as in certain cases of long distance flights the whole passenger space of an aircraft is used as extra or additional tanks for fuel. Whether these are to be regarded as "ordinary tanks" is not

clear, but it is to be supposed that they would be so regarded.

Since the conclusion of the Great War, aircraft have figured prominently on the agendas of Conferences concerned with disarmament, and much has been said as to their use in future wars. The terrors which their use would cause have not been minimised, and strenuous efforts have been made to restrict the operation of aircraft in time of war.

The Arms Conference held at Washington during 1921 and 1922 concluded that it would not be practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military, except in the single case of lighter-than-air craft. Notwithstanding this, the nations of the world have been assembled together at a Disarmament Conference at Geneva since 2nd February 1925, with apparently the same object in view, - the limitation of the use of aircraft for warlike purposes - and with the same result. The only difference is that, so far, the Disarmament Conference has not been sufficiently frank to admit that effective limitation is impracticable. The conference itself has been productive of many amazing suggestions, mainly by the French delegates, which would have a very profound effect on the whole structure of aviation law, both in peace and in war, were they ever to become effective. The establishment of an International Air Force under the control of the League of Nations, an International Police Air Force, also under the control of the League, and the internationalisation of civil aviation as a whole, all of which have been suggested, would have severe repercussions. The internationalisation of Civil

The Rules of Aerial Warfare.

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aviation, in particular, would mean that the Paris Convention and all that has followed it would be worthless, but that and other similar suggestions are so impracticable as to be impossible, and, therefore, unworthy of further consideration.

While that is so, regard must be had to the idea underlying such suggestions namely the necessity for protecting the civilian population and it is to this end that the United Kingdom Delegation, in February 1933, suggested that the General Commission of the Conference should constitute a Committee of the principal air Powers

"to examine the possibility of the entire abolition of military and naval machines and of bombing from the air, combined with an effective international control of civil aviation."

Lord Londonderry, the British Secretary of State for Air, informed the Conference that any scheme for the abolition of military aircraft must be so framed as to prevent all possibility of the resources of civil aviation being used for military purposes in the event of an outbreak of hostilities. In effect, he was stating that no such scheme could be produced. The abolition of military and naval aircraft would greatly simplify the laws governing the use of aircraft in times of war, but, if that is to depend on an effective means of preventing civil aircraft from being used for warlike purposes on the outbreak of hostilities it would be unwise to cease considering the Rules of Aerial Warfare. It is safer to assume that aircraft will continue to be used for warlike purposes and consider, as did the Washington Arms Conference, that

"it is necessary in the interests of humanity and
"to lessen the chances of international friction

(1) Arms Conference, Report of Committee on Aircraft.

Art. 29.

(2) same p. 42 of acqu.

"that the rules which should govern the use of aircraft
"in the war should be codified and be made the sub:
"ject of International Agreement." (1)

1922, 1923 The Washington Arms Conference, on the
recommendation of the Committee on Aircraft, decided
to set up a Commission representing the United States
of America, the British Empire, France, Italy, and
Japan, to consider whether the then existing
International Law covered adequately the use of the
new agencies of Warfare introduced since the Second
Hague Conference in 1907, and, if not, what changes
should be made in the law of nations in consequence
thereof. The Netherlands Government accepted an
invitation to participate in the discussions and the
Commission of Jurists met at the Hague in December
1922. After protracted discussions, an exhaustive
Report was presented consisting of two main parts,
the first dealing with the Control of Radio in
Time of War, and the second with the Rules of Aerial
Warfare which I shall now consider. In doing so
it has to be borne in mind that the object of the
Commission, which had the assistance and advice of
experts in International Law, and in land, naval,
and aerial warfare, was to report to the States
represented. They, in their turn, would confer as
to the acceptance of the Report and the course to be
adopted to secure its recognition by the States not
represented at the Conference. So far, no steps
have been taken to secure its recognition. In order
to facilitate comparison, I shall endeavour, so far as
practicable, to consider the various subjects covered
by the Report in the same order as they appeared in
M. Fauchille's Code (2).

(1) Arms Conference; Report of Committee on Aircraft.
Art. 39.

(2) Ante. p. 72 et sequ.

The first thing which strikes one when comparing the Code agreed upon by the Commission in 1922, (to which for convenience, I shall hereafter refer to as the Hague Code,) with the earlier Codes, is the fullness of detail contained in it, and the special attention paid to the classification of aircraft and to the applicability of the Code. An endeavour was made to embody the same classification of aircraft as was given in the Paris Convention, but as Italy had put its customs aircraft under the control of military forces this was not exactly possible. Aircraft were classified as public, including military aircraft and non-military aircraft exclusively employed in the public service, and private, embracing all aircraft not falling under the category of "public" aircraft (Art.2.) The service in which an aircraft is employed will be evidenced by the papers which it carries, and in addition public non-military aircraft employed for customs or, police purposes shall bear an external mark indicating their nationality and their public non-military character (Art.4.). Other public non-military aircraft will bear the same external marks, and for the purposes of the Rules, be treated as private aircraft (Art.5.) The marks carried by aircraft must be so affixed that they cannot be altered in flight (Art.2.).

Under the Hague Code, a military aircraft shall bear an external mark indicating its nationality and military character (Art.3) and must be under the command of a person duly commissioned or enlisted in the military service of the State. The crew must be exclusively military (Art.14.). Furthermore, the crew must wear a fixed distinctive emblem by which their

character may be recognised in case they become separated from their aircraft (Art.15.).

The identification of "military" aircraft has been the cause of much divergence of opinion. M.Fauchille, in addition to the requisites laid down in the Hague Code, made it a condition also that the aircraft had been "assigned by the State to a military duty" and that it carried the national flag in the form of a pennant(3). Dr. Spaight's proposal was in substance similar to the Hague Code (4). The Draft Convention of 1910 required in addition that the aircraft had on board a certificate establishing its military character (5), and by the Convention of 1919, every aircraft commanded by a person in military service detailed for the purpose is to be deemed to be military aircraft (6).

The question of what constitutes a military aircraft is of supreme importance in times of peace as well as in times of war, and, since the Commission of Jurists met at the Hague, has been freely discussed. Until that date the tendency had been to determine whether an aircraft was or was not a military aircraft by the position of the person in charge of it. To be military it must be under the command of a person who, by some means or another could be identified as being engaged in military service. In such a case, States would decide that the aircraft was military and they would affix signs on it which would show its military character. Under that system, however, there was a loophole, since it was possible for an aircraft adapted for warlike purposes, and truly a military

(3) Rules for Peace. Arts.1 and 4.

(4) Aircraft in War.

(5) Ante.p.93.

(6) Art.31.and ante p.141.

aircraft to fly over the territory of a State if it was not in charge of a person under the military service. In other words, it was not the character of the aircraft itself which counted but the character of its commander.

The first real attempt to classify aircraft as "military" according to their own characteristics was in 1926 when the attempt was made to define what were military and naval aircraft under Article 198 of the Treaty of Versailles, the Article by which Germany was prohibited from having any military or naval air forces. In the peculiar circumstances of that case, the definition "military", was made as wide as possible and the object for which the aircraft was constructed was taken as the determining factor in the classification. Fortified by this, the German Delegate to the Conference called in 1929 to consider the revision of the 1919 Convention endeavoured to have Article 31 thereof altered in such a way as to include as "military" aircraft for the purposes of that convention, aircraft which were armoured or protected in any way, or provided with the means to carry any warlike material, such as ⁿcanons, guns for the discharge of grapeshot, torpedoes, bombs, or the means of discharging material of that nature, but the proposal did not meet with any great enthusiasm, and was shelved for the time being.

M. Giannini (7) has tried to reconcile the two sides by suggesting the following Article

"aircraft carrying a military identification mark and those which, by their type of construction or armaments are intended for military purposes will be considered military aircraft,"

(7) Gli Aeromobili Militari, Rivista Aeronautica, No.6. June 1931.

and, as a possible extension thereof,

"aircraft whose commander and crew are military and
"in uniform are presumed to be military aircraft."

He favours a definition based on the classification of the aircraft, but while there are circumstances in which this would be desirable, they are more applicable in times of peace when it might be dangerous to allow an aircraft, constructed for military purposes, to fly over the territory of States other than its own except by special permission. The argument is, of course, open to the same objections as have caused the complete deadlock in the Disarmament Conference, namely that all aircraft can be considered as being constructed for military purposes, a fact which Germany has recently demonstrated in no ^{un}certain manner.

The definitions given by the jurists at the Hague are simple and it would be difficult to find any more suitable for the purpose of the Rules of Warfare. Military aircraft are alone entitled to exercise belligerent rights (Art.13.) and, in such cases it is the character of the commander and crew which counts. One could not consider the civilian flying over the territory of a belligerent in an aeroplane constructed for warlike purposes being entitled to the benefit of the rules of warfare applicable to belligerents. It is more than likely that he would have difficulty in proving that he had not in fact been guilty of espionage.

No precise exposition as to the theatre of aerial warfare, such as was given in Articles 1 and 19 of M.Fauchille's Code (8) appears in the Hague Code and this must be gleaned from several Articles. The

Rules of the Hague code are in harmony with the principle of sovereignty, subject to the privilege of innocent passage to contracting States, recognised in the Paris Convention. Therefore,

"outside the jurisdiction of any State, belligerent or neutral, all aircraft shall have full freedom of passage through the air and of alighting" (Art.11.)

and, as the freedom of innocent passage allowed under the Paris Convention may prove impracticable during war, it is provided that then

"any State whether belligerent or neutral may forbid or regulate the entrance, movement or sojourn of aircraft within its jurisdiction," (Art.12.),

This right is to my mind inherent in the recognition of sovereignty but it has apparently been thought advisable to reiterate it in the Code.

The rights of belligerents in neutral atmosphere under the Hague Code differ materially from M.Fauchille's Code. Indeed, in so far as they prohibit entry (Art.40); regard aircraft on board vessels as part of such vessels (Art.41); and provide for the taking possession of the aircraft which do enter, and the internment thereof, and of the passengers and crew (Art.42), they are identical with the proposals in Dr.Spaight's Code.(9). This is perhaps not to be wondered at as the Commission worked on the basis of two draft Codes, one of which was submitted by the American delegation and the other by the United Kingdom. As Dr.Spaight was a member of the latter delegation, one would expect to find some, at least, of his views incorporated. In addition, "the personnel of a disabled belligerent military aircraft rescued outside neutral waters and brought into the jurisdiction of a neutral state by a neutral military aircraft, and there landed, shall be interned."(Art.43.)

This, the Report states, brings the crew of a disabled

(9) Ante.pp.74 & 75.

belligerent aircraft in line as to treatment with the crew of a belligerent warship brought into a neutral port in similar circumstances, as provided by Art.15 of the Geneva Convention relating to Maritime war (1907). While this may be so, it would appear that they are only dealt with under the Article if brought into the neutral jurisdiction by a "neutral military aircraft". One is left to assume that the same treatment would be meted out to crews of disabled aircraft brought in by any other means.

The difficulties to which M.Fauchille's suggestion (10) that the principles of the Hague Convention relating to the neutral rights and duties in maritime war were generally applicable to aerial war gave rise have been provided for in the Hague Code. Dr. Spaight is followed in the provision that a neutral State is not

"bound to prevent the export or transit on behalf of
"a belligerent of aircraft, parts of aircraft, or
"material, supplies, or munitions for aircraft"
(Art.45.)

although the supply of such articles, directly or indirectly by a neutral government to a belligerent power is forbidden (Art.43.) It has been recognised however, that in certain circumstances an aircraft might be fitted out in neutral territory, just as a ship, for an expedition against an opposing belligerent, and to meet this, it has been provided that a neutral government is bound to use the means at its disposal

"to prevent the departure from its jurisdiction of
"an aircraft in a condition to make a hostile attack
"against a belligerent power, or carrying or accom:
"panied by appliances or materials, the mounting or
"utilisation of which would enable it to make a
"hostile attack, if there is reason to believe that
"such aircraft is destined for use against a

"belligerent power." (Art.46.). non-allied aircraft

The departure of any aircraft, the crew of which includes any member of the combatant forces of a belligerent power, must be prevented, as must work on any aircraft designed to prepare it for a departure in contravention of those provisions.

As to the M.Fauchille was at pains to prevent neutral atmosphere being used by the aircraft of one belligerent to obtain information as to the movements of the other. Under the Hague Code this could not be done directly since the circulation of belligerent aircraft in neutral atmosphere is forbidden, but it could be done indirectly, by neutral aircraft, for the purpose of communicating information to a belligerent. The Code provides that a neutral State is bound to take such steps as the means at its disposal permit, to prevent its atmosphere being used for that purpose.

Exploration Privateering is forbidden under the Hague Code, as it was by M.Fauchille (11) and no private aircraft shall be armed in time of war when outside the jurisdiction of its own country (Art.16). The Commission considered the case of merchant ships being armed in time of hostilities but decided that the interests of private aircraft were better served by the adoption of a rule against arming. Nevertheless, while a gun may or may not be of little use to defend an aircraft which is illegally attacked, there are, as will be seen, circumstances in which it is not equitable to assimilate private aircraft to merchant vessels while depriving them of this right to carry arms.

(11) Ante.p.77.

The right to convert non-military aircraft public or private into military aircraft is recognised (Art.9) but only within the jurisdiction of the State to which it belongs, and not on the high seas. This latter provision, which differed from that of M.Fauchille (12), was not accepted by the French delegation to the Conference.

Under the heading of hostilities, the Hague Code provides for the use to which aircraft can legitimately be put in time of war, and, in particular what can be discharged from them for the purpose of destruction. Prior to 1914, the jurists had tended to apply the Declaration of St.Petersburg and the various Hague Declarations relating to the discharge of different types of projectiles, and to bombardment, to aircraft where that had not been done in grae mio of the Hague Declarations themselves. The hostilities, however, proved that in some cases these Declarations were not suited to aircraft, and, as a result, the Hague Commission was in a position to make rules in the light of experience. For example, one finds a declaration that the use of tracer, incendiary, or explosive projectiles by or against aircraft is not prohibited (Art.18), it having been found that it was only by the use of such projectiles that the aeronaut was able to ascertain the accuracy of his fire.

It is with the whole question of air attack and bombardment directed at the civilian population that the greatest difficulty has been experienced in arriving at a unanimous agreement.

There is a general agreement that the greatest

possible measure of protection must be afforded to it but it is not easy to find a suitable formula - one which will allow bombardment of legitimate objects but will protect the civilian population when such objects are to be found in centres of the civilian population. In the end, the Hague Commission was able to come to a unanimous decision as to the text to be adopted. By it, the cases in which bombardment is absolutely prohibited are defined. These are where the bombardment is "for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants" (Art.23),

and when it is

"for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money." (Art.23).

The International Law Association adopted precisely the same prohibitions in the Regulations for War in the Air suggested at the Stockholm Conference in 1924.

Following the course adopted by the Allied Powers during the Great War, the test of towns and the like being "defended" has been rejected in determining the legitimate objects of bombardment. Aerial Bombardment is legitimate (Art.24) if directed "exclusively" at objects

"of which the destruction or injury would constitute a distinct military advantage to the belligerent" and these objects are specifically enumerated.

When they are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, bombardment is prohibited. Those provisions also are followed by the International Law Association.

As regards "cities, towns, villages, dwellings or buildings", their bombardment is prohibited if they are not in the immediate neighbourhood of the land forces, but where they are in the immediate neighbourhood, bombardment is legitimate

"provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment having regard to the danger thus caused to the civilian population."

The International Law Association suggests a different treatment. Under the regulations adopted by that Association aerial warfare, which includes either attack or bombardment, directed at cities, towns, villages, and other inhabited places is prohibited, unless in the special case where the attack of bombardment of the land forces with a view to effective occupation of such cities, towns, villages, and other inhabited places is resisted, in which event the employment of aircraft in aid of the attack or bombardment may be considered lawful.

Furthermore, under the Hague Convention, in Aerial bombardment, all necessary steps must be taken to spare

"buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, ships, hospital, and other places where the sick and wounded are collected"

if such places are not at the time being used for military purposes (Art.25). The buildings must be indicated by marks visible to aircraft and elaborate provisions are made for the creation of "zones of protection" round important historic monuments (Art.26). The provisions for sparing such buildings are embodied in the Land Warfare

Regulations and Naval Bombardment Convention, and are also to be found in the Regulations of the International Law Association.

There is however yet another side to this matter of aerial attack or bombardment on the civilian population. When the Disarmament Convention first met, all the delegates gave expression to the views of their respective Governments on this matter. Some favoured the complete abolition of bombing and military aircraft, while others, like Japan, favoured protection of the civilian population only in so far as had been suggested by the Hague Commission. But a perusal of the Reports discloses that several countries, such as Germany, Switzerland, Austria, Belgium, and Latvia, were in favour of an absolute rule whereby the dropping from aircraft of bombs or any other objects or materials serving military purposes would be prohibited. The General Commission of the Conference adopted a Resolution on 23rd July 1932, before its adjournment, whereby the air attack against the civilian population would be prohibited, and bombardment from the air abolished, subject to agreement with regard to the measures to be taken to enforce such a rule (13). The same view was expressed in the Draft Convention submitted at a later date by the United Kingdom Delegation, Article 34 of which was in the following terms,

"The High Contracting Parties accept the complete abolition of bombing from the air (except for police purposes in certain outlying regions)."

The British Draft Convention was taken as the basis of discussion and finally Article 34 was referred to Dr. Lange, as Rapporteur in view of the doubts expressed as to the exception contained in the brackets

The Rapporteur, after having communicated with all the interested Delegations, proposed an amended Article whereby

"the High Contracting parties accept the complete abolition of bombing from the air and undertake to prohibit in their territory all preparations for such bombardment and all training in its methods." an Article which I think bears distinct traces of German influence.

The Disarmament Conference is, of course, in abeyance meantime and no progress can be made towards the acceptance, in any form, of the proposed Article. Nevertheless, it seems that the Resolution of 23rd July 1932 is indicative of the general feeling of the nations towards aerial attack and bombardment of the civilian population. The complete abolition of bombardment has much to recommend it, both in the interests of humanity, and from the point of view of the difficulty which must surround the putting into practice of the rules suggested by the Hague Commission and by the International Law Association. Rules for the conduct of aircraft in War are framed on the assumption, however slender, that they will be observed, and in that light I see no reason why -if the civilian population is to be protected - the rule of absolute prohibition should not be applied. Even under the Hague Code, the civilian population must suffer the terrors of aerial bombardment, for it leaves too wide a discretion to the commander in determining how far bombardment is to be effected with reasonable safety to the civilian population, and the difficulties attending its operation are such that strict observation of

the proposed rules would be almost impossible. In fact the same result would be obtained by permitting the bombardment of military objectives wherever they were situated.

The Articles on Espionage contained in the Hague Code (Arts.27-29) are short and MM.
(14)
Fauchille and Le Moyne are followed in so far as the definition of a spy in the Code follows that given in Article 29 of the Land Warfare Regulations. Dr. Spaight's objections have accordingly not been met, but his proposed Code is followed in so far as it provided for an individual landing from an aircraft, and who is guilty of espionage, being subject to the Land Warfare Regulations.

The seizure of aircraft found in invaded territory is dealt with rather differently from the way in which M.Fauchille and others proposed, although with the same result. Enemy public aircraft are to be liable to seizure and confiscation (Art.32) as was proposed by M.Fauchille, (15), but, differing from his proposal and that of Dr.Spaight (16), private aircraft are to be dealt with under the provisions of Article 53 of the Land Warfare Regulations, without special provision. As, however, it is not clear under that Article how neutral private aircraft found upon entry in the enemy's jurisdiction are to be dealt with, it is specially provided that such aircraft may also be requisitioned, but full compensation will be paid at the time of confiscation and not, as in the case of enemy private aircraft, at the peace. (Art.31). Otherwise, private enemy aircraft

(14) Ante.p.80.

(15) Ante.p.81.

(16) Ante.p.82.

are assimilated to merchant ships and declared liable to capture in all circumstances (Art.52) although they are not entitled to be armed to enable them to resist capture (Art.16). Like merchant vessels, also, they may be destroyed after capture if all persons on board have been placed in safety and the aircraft's papers have been preserved.

The guiding principle, so far as the treatment of the passengers and crew of enemy aircraft is concerned, has been the use to which such persons could be put in the service of the State, the principle which had caused Dr. Spaight to differ from M.Fauchille(17). Where the aircraft is a military aircraft, both crew and passengers may be made prisoners of war if the aircraft falls into the hands of the enemy. The crew and passengers of public non-military aircraft will be treated in the same way unless in the case of a public non-military aircraft which is devoted entirely to the service of passengers who will then only be made prisoners of war if they are in the service of the enemy or are enemy nationals fit for military service. In the case of an enemy private aircraft, members of the crew who are nationals or who are neutral nationals in the service of the enemy may be made prisoners of war, but the latter may be released if they undertake not to serve in any enemy aircraft while hostilities last. Passengers will be released in the same circumstances as those on public non-military aircraft devoted to the service of passengers (Art.36). The crew and passengers of any neutral aircraft which has possible landing ----- of the approach of (17) Ante.p.83.

military aircraft of the opposing belligerent (Art.33)

been detained are entitled to be released unless they are enemy nationals or in the service of the enemy, when they may be made prisoners of war (Art.37). In all cases, the members of the crew or passengers made prisoners of war will be entitled to treatment "not less favourable than that accorded to prisoners of war". (Art.38.).

The provisions regarding the destruction of private or public non-military aircraft go further than even Dr.Spaight had proposed (18). They may be fired upon (a) while flying within the jurisdiction of their own State unless they make the nearest available landing on the approach of enemy military aircraft (Art.33); (b) if they fly within the jurisdiction of the enemy or in the immediate vicinity thereof and outside the jurisdiction of their own State, or in the immediate vicinity of the military operations of the enemy by land or sea (Art.34.); and (c) on the refusal, after warning by belligerent military aircraft to alight or proceed to a suitable locality for the purpose of visit and search (Art.50). Neutral aircraft may be fired upon in two cases, the first, where a belligerent commander considering that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged, has issued a notice prohibiting the passing of neutral aircraft within the area or prescribing a route to be followed, and such aircraft do not conform to his regulations (Art.30.), and, the second, where, while flying within the jurisdiction of a belligerent, they have failed to make the nearest possible landing on being warned of the approach of military aircraft of the opposing belligerent (Art.35)

The destruction of private non-military aircraft in other circumstances is dealt with under the Chapter of the Hague Code concerning "Visit and Search, Capture, and Condemnation", all subjects which had been treated lightly by the earlier jurists. The Commission was unable to decide upon an Article covering the exercise by belligerent military aircraft of the right of visit and search of merchant vessels, due to the divergence of opinion as to the right to divert a merchant vessel from its course without first boarding it although the International Law Association has agreed that the right to visit and search and to detain a merchant vessel is reserved to aircraft. It was decided, however, that private aircraft were liable to visit and search, and to capture by belligerent military aircraft (Art.49). The capture of a neutral private aircraft was limited to the cases enumerated in Article 53 of the Code. These are as follows,

- (1) Where it resists the legitimate exercise of belligerent rights.
- (2) Where it violates a prohibition of which it has had notice issued by a Belligerent Commanding Officer under Article 30. This is one of the cases in which it might be fired upon, and, according to the Report, the purpose of this provision is to persuade the party firing on the aircraft from actually destroying it, which, but for the provision, he would invariably be tempted to do.

The Code provides for the institution of a Prize Court in which proceedings may be taken in order that any neutral claim may be duly heard and determined (Art.55), thus putting aerial law on the same

footing as maritime law. Except in certain cases peculiar to aerial warfare - cases which are not recognised by the International Law Association - the Prize Court will apply in the case of the capture of an aircraft or its cargo, the same rules as would be applied to merchant vessels and their cargo or to postal correspondence on board a merchant vessel (Art.56). The violation of a direction under Article 30 of the Code is one of the cases peculiar to aerial warfare, and in this case, the Prize Court is directed to condemn the captured aircraft "unless it can justify its presence within the prohibited "zone" (Art.56).

(3) When it is engaged in unneutral service. The intention of the Commission was to apply the provisions of the Declaration of London to similar action taken by Aircraft. This was also the opinion of M.Fauchille but who further added the case of neutral aircraft circulating above belligerent States as being presumptive of unneutral service. (19)

In this case the aircraft may be destroyed "if sending it for adjudication would be impossible or "would imperil the safety of the belligerent aircraft "or the success of the operations in which it is "engaged" (Art.58).

(4) Where it is armed in time of war when outside the jurisdiction of its own country, and, in the subsequent Prize Court proceedings it is liable to condemnation (Art.56.). As I have already stated, this matter of arming private aircraft is not altogether satisfactory, and, in the light of what has been said, it seems a very harsh provision that a neutral private aircraft should be liable to capture

merely because a gun has been mounted for the purposes of defence. It is surely overstating the point to say, as does the Report, that the carriage of arms in such a case "gives rise to a wellfounded "suspicion of an intention to take part in hostilities "in violation of the laws of war" (20)

(5) When it has no external marks or uses false marks. The use of false marks is forbidden under the code (Art.19).

This again is an offence peculiar to aerial warfare. The aircraft is liable to condemnation (Art.56), and to immediate destruction (Art.58) in the same circumstances as an aircraft engaged in unneutral service.

(6) When it has no papers or insufficient or irregular papers. As the Paris Convention is not yet universally recognised, it has been provided that the papers will be insufficient or irregular

"if they do not establish the nationality of the aircraft and indicate the names and nationality of the crew and passengers, the points of departure and destination in flight, together with particulars of cargo and the conditions under which it is transported." (Art.54.).

(7) When it is manifestly out of the line between the point of departure and the point of destination indicated in its papers, and, after such enquiries as the belligerent may deem necessary, no good cause is shewn for such deviation. The necessity for this rule is to be found in the ease with which aircraft may be used to obtain information, but, as the Report indicates

"it will only be where the results of such investigation show that there is good cause for suspicion

"that the aircraft was engaged in some improper operations that capture will be resorted to,"(20).

(8) Where it carries or itself constitutes contraband of war. This rule is based on the assumption that "contraband of war" is to have the same meaning as it has in maritime war. M.Fauchille followed the same course (21) in determining what constituted contraband.

Dr. Spaight had provided that where an aircraft itself constituted contraband of war it could be destroyed "if demanded by imperative "military necessity"(22) but the Hague Code provides also for the destruction of contraband carried "if sending it for adjudication is impossible or "would imperil the safety of the belligerent aircraft "or the success of the operations in which it is "engaged." (Art.60.).

(9) When it is engaged in breach of a blockade duly established and effectively maintained, a provision having some resemblance to that suggested by Prof. Von Bar (23). The blockade must be one in the sense of the Declaration of London. One in which aircraft alone are used is not contemplated.

(10) When it has been transferred from a belligerent to neutral nationality at a date and in circumstances indicating an intention of evading the consequences to which an enemy aircraft as such is exposed. The purpose of this is to bring aerial and maritime law in line with one another. The same result was obtained by M.Fauchille in Article 10 of his proposed Code.

In all these cases where a neutral aircraft is destroyed, the crew and passengers must

(21) Ante.p.86.

(22) Ante.p.87.

(23) Ante.p.87.

Conclusion.

be placed in safety and the papers preserved (Art.59). The destruction must afterwards be justified before the Prize Court, a provision which is also applicable to contraband destroyed under Article 60.

The Commission has rendered a valuable service, and, although some of its provisions are premature, and some may be fundamentally altered before finding any measure of support, the Code which it has prepared marks a distinct advance in the development of the Rules of Aerial Warfare. The day is still far distant, however, when a Code of Rules regulating the use of aircraft in time of war will be universally recognised.

of the problems which arise in connection with what I have termed "the law in relation to aircraft." That law is not confined to one particular branch. On the contrary, it is difficult to find a branch of the law which is not affected by the origin and development of aviation. This has rendered continuity of treatment almost impossible. It has had a further effect, for, to prevent this thesis being of inordinate length, I have been unable to make more than a cursory examination of topics which are worthy of more exhaustive study - topics which would in themselves constitute fit subjects for a legal thesis. Nevertheless, while the material available for research in Great Britain is limited and I have been thrown back for my information on Continental and American publications, access to which is difficult, I hope I have succeeded in showing the various stages in what I consider a remarkable and rapid development in a sphere of law about which

Chapter 14.Conclusion.

I have now completed that which I set out to do, namely, to show how the law in relation to aircraft has developed from the time of its inception to the present day. The period covered has been short, less than fifty years, and, since the law is of such a modern nature, I have found difficulty in presenting anything in the way of historical research. I have been compelled to discuss a law as it now exists with the result that I have tended to consider the future rather than to reveal the past. Another factor which has contributed to the difficulty of research is the multiplicity and diversity of the problems which arise in connection with what I have termed "the law in relation to aircraft." That law is not confined to one particular branch. On the contrary, it is difficult to find a branch of the law which is not affected by the origin and development of aviation. This has rendered continuity of treatment almost impossible. It has had a further effect, for, to prevent this thesis being of inordinate length, I have been unable to make more than a cursory examination of topics which are worthy of more exhaustive study - topics, which would in themselves constitute fit subjects for a legal thesis. Nevertheless, while the material available for research in Great Britain is limited and I have been thrown back for my information on Continental and American publications, access to which is difficult, I hope I have succeeded in showing the various stages in what I consider a remarkable and rapid development in a sphere of law about which

little is generally known and which has many peculiar features of absorbing interest.

I do not intend to recapitulate and I shall reiterate but one thing. The barest glance is sufficient to show that the outstanding characteristic of aviation law is the rapidity with which it has progressed to a very high degree of development. For instance, whereas in 1910 the term "aircraft" was defined in the Paris Convention as comprising "free balloons, airships, and flying machines", in 1935 it comprises "all machines which can derive support in the atmosphere from the reactions of the air", and the word aeroplane which it was not thought necessary to define in 1910, is now defined as

"a mechanically-driven aerodyne supported in flight by
"aerodynamic reactions on surfaces remaining fixed under
"the same conditions of flight"

a definition of which the layman is blissfully ignorant.

We have not yet reached the stage in the development of aviation in which Tennyson

"Saw the heavens fill with commerce, argosies of
"magic sails,
"Pilots of the purple twilight, dropping down with
"costly bales;
"Heard the heavens fill with shouting, and there
"rained a ghastly dew
"From the nations' airy navies grappling in the
"central blue;"

but the present generation has witnessed extraordinary progress in that direction. The generations of the future may see even greater progress. They will certainly see it in the law.

The law has advanced far but I am of opinion that, remarkable as the development has been, it is more apparent than real. When one regards the mass of Statutes, Rules and Regulations which are now in force one is tempted to think that considerable progress has

been made. Actually they are only the bare foundations of the law on which future generations will require to erect and carve the edifice. They are merely the objects on which the experiments are about to be made.

I would not even say that those foundations which have been laid are themselves secure and it may well be that they will require to be pulled down and reconstructed before the walls can be erected. For example there are the organisations at work on the development of the law. I have shewn that they are numerous. They are also working at cross purposes for they represent conflicting interests. Among industrial concerns, it has been found advisable, within recent years, to undertake the process of what is known as rationalisation - the elimination of those concerns working at a loss and the combining of the profit-making fragments into one successful profit-making whole. I consider that among the organisations existing to further the development of aviation law some such process of rationalisation might be profitably undertaken. The I.C.A.N. is one which could not be dispensed with but there are others whose functions could be incorporated in one of its Sub-Commissions.

Then there is the law itself. I have shewn that the tendency is towards complete uniformity, but, while it sounds well to say that the laws must be uniform, it is no simple matter to put the proposition into practice. There is always a danger of pressing the principle of uniformity too far. The danger arises from confusing the idea of uniformity of legal principles with uniformity of detail. It is one thing

to get the principles of the law the same in various countries, it is another to make the details the same. The one is possible but the other is not. It was for this reason that the Havana Convention was completed without Annexes such as are appended to the Paris Convention. It was felt that it would be better to agree on the principles to be observed and leave the details to the various States. I do not for one moment advocate that the Annexes to the Paris Convention should be discarded for I cannot conceive that this would be either practicable or desirable, but when one considers the various projected Conventions prepared and submitted by the C.I.T.E.J.A. one can appreciate better the attitude of the States parties to the Havana Convention. Not only are they a mass of detail. They are complicated in yet another respect - that of language.

The Paris Convention has three "official" texts, French, English, and Italian. The other proposed Conventions are usually in French. This makes interpretation difficult, and, as in matters of detail they tend to introduce notions which are entirely foreign to some national legal systems, it will readily be recognised that, far from creating uniformity, they will have the very opposite result.

In the Protocol of Amendments to the Paris Convention which came into force on 17th May, 1933, it is provided that, as far as concerns interpretation, "in case of divergencies the French text shall prevail", but this is not sufficient. Presumably, in any question concerning the interpretation of a Convention, say the Warsaw Convention, the text in which it is

signed, the French text, would prevail, but I cannot conceive the position which would exist in Scotland if the Court of Session was called upon to interpret the French text of a Convention, particularly when it was introducing a principle which was Continental and entirely contrary to the established principles of the Scottish Law. It would inevitably interpret it, so far as possible, according to the Law of Scotland. A French Court might give it an entirely different meaning. The result is confusion.

I must confess that I cannot see how any change can be made in the manner in which such International Conventions are concluded. I am also unable to see how the Courts can interpret them in the light of a law other than their own national law. The remedy must lie in another direction, and that direction I think is obvious - the International Court first mooted by the Fifth International Congress on Aviation Law. I can conceive no better remedy, and, for law so essentially international as aviation law, there can be nothing so absolutely essential as the formation of an International Court available to private individuals to settle the differences of interpretation which must inevitably arise.

If further support of this contention is required it is to be found in the matter of jurisdiction to which I have referred elsewhere. The specialities of aviation and the rapidity with which aircraft can proceed from one country to another make it difficult, although not impossible, to

apply the existing rules of Private International Law. The various proposed Conventions make special provisions as to jurisdiction to suit the peculiar circumstances of the matters to which they relate, but in doing so they create complications, and diversity rather than uniformity of the rules by which jurisdiction is to be determined. The position would be entirely changed and greatly simplified if all such matters could be dealt with by an International Court, the judgments of which could be enforced against the defender in his own national State.

It must not be assumed that the topics which I have considered exhaust all the matters which are likely to arise in aviation law. I have covered the ground as it is today, but, with the further progress in aviation, new problems will be added to the many which still await a solution. I cannot prophesy what those may be, but I would end this treatise by mentioning one which is already visible on the horizon and which is of great importance in the realm of International Law. I refer to the "seadrome", the French equivalent of which, "L'île flottante", has even greater significance. It is the floating structure, the aerodrome of the sea, on which aircraft engaged in transoceanic flights can land for refuelling or repair.

The creation of the seadrome is indispensable in the interests of aviation, but, as its utility only arises when it is moored on the High Seas, the very mention of it has started the pens of jurists in much the same way as did the first

appearance of aircraft. The crux of the whole matter is that the construction by one nation of a seadrome on the High Seas is a violation of the recognised principle of International Law that no nation can claim jurisdiction over the High Seas which will exclude an equal jurisdiction by every other nation. It may be that its construction is not legitimate but the interests of aviation must, in this case, prevail. The basis of discussion, therefore, must be that a seadrome can be constructed, but if that is so what is its legal position? Is it under the sovereignty of the State which constructed it? Is it to be regarded as the exclusive territory of that State? Can the aircraft of other nations be precluded from using it? Those are but a few of the questions to which its constructions gives rise.

The seadrome has to be regarded as sui generis. It is not an "island" in the true sense of the word for, at the First Conference for the Codification of International Law, an island was thus defined:-

"Une île est une étendue de terre, entourée d'eau,
 "qui se trouve d'une manière permanente au-dessus
 "de la marée haute."

Floating structures of the nature of the seadrome were expressly referred to as falling outwith the scope of that definition. So also, from its very nature, the seadrome cannot fall within the definitions of a "ship". It has characteristics of both the island and the ship but it is neither one nor the other.

It is not my intention to examine in detail the views which have been expressed as to the legal position of "L'île flottante". They are many and one can

hardly find agreement on any point. Dr Sandiford supports the theories of the Comité Juridique International de l'Aviation in giving the entire ownership and control to the state which constructed it. M. Giannini and M. de Fonseca Hermes go to the opposite extreme by denying ownership and control to any one country and putting the control under the League of Nations. One thing is certain. The seadrome must be free to all nations and its ownership and control must be regulated by international agreement. More justice will be done by denying the right of States to create additional national territory by way of erecting seadromes than by permitting them to do so, and I consider that the seadrome should be under the control of an International Commission. This would be in the best interest of all concerned. In any event, in time of war, the seadrome must be neutral territory, for it is unthinkable that it could ever be regarded as belligerent territory.

The seadrome presents many interesting international legal problems and one could enlarge upon the points which I have just raised. That is not my intention. I have mentioned them only to show that, great as has been the development of the law in relation to aircraft in the past, it is not complete. It will be for future generations to add to the foundation which I have endeavoured to lay by writing a thesis on the subject at this time.
